TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights (NCR) land situated at Rumah Sandah and Rumah Lajang, Ulu Machan, 96700 Kanowit, Sarawak) v Director of Forest, Sarawak & Anor and other appeals

FEDERAL COURT (PUTRAJAYA) — CIVIL APPLICATION NOS 01–27–04 OF 2015(Q), 08(RS)-3–03 OF 2019(Q) AND 08(RS)-4–03 OF 2019(Q)

AZAHAR MOHAMED CJ (MALAYA), DAVID WONG CJ (SABAH AND SARAWAK), ALIZATUL KHAIR, ZAWAWI SALLEH AND IDRUS HARUN FCJJ

11 SEPTEMBER 2019

Civil Procedure — Appeal — Appeal to Federal Court — Whether there was in substance no majority decision by remaining four judges of Federal Court panel following retirement of fifth judge in panel — Whether 3–1 verdict allowing appeals was only superficial majority with no legal standing — Whether separate judgment of one judge in majority emphatically concurred with view of dissenting judge on main issue of law in appeals — Whether only reason said majority judge allowed appeals was because he found plaintiffs had not evidentially proven their case — Whether said judge wrong to so hold as evidential proof by plaintiffs never in issue in appeals — Whether said judge had no jurisdiction to interfere with and differ from findings of facts by trial court which were affirmed by Court of Appeal — Whether Federal Court evenly divided as result — Whether there was breach of s 78(2) of the Courts of Judicature Act 1964 — Whether plaintiffs' application for Federal Court to review and set aside majority judgment and order appeals to be reheard should have been allowed — Rules of the Federal Court 1995 r 137

Constitutional Law — Courts — Federal Court — Whether Chief Justice ('CJ') had duty under s 74 of the Courts of Judicature Act 1964 ('the CJA') when empanelling Federal Court to hear appeals from the Borneo States to include at least one judge with 'Bornean judicial experience' — Whether such duty arose from Judiciary's obligation as organ of state to ensure that recommendation in para 26(4) of the Inter-Governmental Committee Report 1962 ('IGC') read together with article VIII of the Malaysia Agreement 1963 ('MA') for inclusion of such a judge implemented — Whether ensuring compliance with said provisions of the IGC and MA imperative to honour terms and conditions agreed upon by founding fathers of Malaysia in the formation of the nation and to promote public confidence in the judiciary — Whether CJ's omission to include judge with 'Bornean judicial

experience' in panel of court in an appropriate case constituted coram failure for breach of s 74 of the CJA

The applicants herein, who were Ibans and natives of Sarawak, applied to the Federal Court under r 137 of the Rules of the Federal Court 1995 ('the RFC') to review and set aside its majority decision against them on three appeals that were filed by the respondents. The applicants also sought an order that the court uphold and affirm the dissenting judgment that was made in their favour in the appeals; alternatively, that the appeals be reheard. The appeals were against the decision of the Court of Appeal ('COA') affirming the High Court's upholding of the applicants' claims to native customary rights ('NCR') and usufructuary rights over certain lands in Sarawak ('the lands'). The High Court not only held that Sarawak law recognised the native customs of *pemakai menoa* and *pulau galau* but also found that the applicants had proven on balance of probabilities that they had practised those native customs on the lands to entitle them to claim NCR and usufructuary rights and that a provisional lease that the authorities had granted over a part of the lands to a company (Rosebay Enterprise Sdn Bhd) had infringed those rights. The COA affirmed the findings of the trial court and dismissed the respondents' appeal. The respondents were granted leave to appeal to the Federal Court against the COA's decision on three questions of law. A panel of five judges heard the Federal Court appeals jointly but before the date of delivery of decision, one of them had retired from service leaving the remaining four judges entitled to deliver the court's verdict pursuant to s 78(1) of the Courts of Judicature Act 1964 ('the CJA'). Section 78(2), however, provided that if there was no majority decision by the remaining judges of the court, the appeals had to be reheard. The appeals were allowed by a 3–1 majority (Justice Zainun Ali wrote a dissenting judgment) resulting in the decisions of the COA and the High Court being set aside. Two of the judges in the majority decided that Sarawak law did not recognise the native customs of *pemakai menoa* and pulau galau and they answered the questions of law posed to the court accordingly. The remaining judge in the majority ('Justice Abu Samah') wrote a separate judgment declining to answer any of the leave questions but stating that he was allowing the appeals on the ground that, on the totality of the evidence, 'there was no sufficient evidence to support the claims by the plaintiffs ('the applicants') on the balance of probabilities' and, therefore, the courts below had committed 'manifest error in judicial appreciation of the evidence'. In the instant review applications, the applicants contended that: (a) they had suffered an injustice because there was in fact and substance no 3–1 majority decision as Justice Abu Samah's supporting judgment concurred with Justice Zainun Ali's dissenting judgment on the law; that he had only differed on the ground that the applicants had not factually/evidentially proven their claims to NCR rights in the lands. The applicants thus contended that on the law (ie, whether Sarawak law recognised the native customs of *pemakai menoa* and *pulau galau*) the decision of the Federal Court was evenly divided (2–2) and the

appeals should have been reheard pursuant to s 78(2) of the CJA; (b) they had also suffered an injustice by the Chief Justice's failure, under s 74 of the CJA, to have included at least one judge with 'Bornean judicial experience' in the panel that heard the appeals (since the subject-matter concerned a dispute arising from the Borneo States) in keeping with para 26(4) of the Report of the Inter-Governmental Committee ('IGC') 1962 read together with article VIII of the Malaysia Agreement 1963; and (c) the majority judgment had expounded an opinion that was wrong in law.

Held, by majority, dismissing the review applications:

(1) **(per Azahar Mohamed CJ (Malaya), majority)** The inherent jurisdiction of the Federal Court to review its decision must only be exercised in very limited circumstances to prevent injustice or an abuse of process of the court. The applicant must be able to show on the face of the record that there was injustice. The inherent power could not be invoked to review the court's decision on its merits and under no circumstances should the court hear a review application as if it were hearing an appeal and decide the case as such. Otherwise, there would be no finality to litigation. Finality of proceedings was of fundamental importance to the certainty of the administration of law. In the interests of the public and the administration of justice there had to be finality to litigation (see paras 12–13).

(2) **(per Azahar Mohamed CJ (Malaya), majority)** On the face of the record, it was not shown that there was injustice. The present review applications were an attempt to re-litigate the substantive merits of the three appeals and reopen and re-examine a final decision of the court and have another panel overrule the majority decision and uphold the minority judgment. The applicants were attempting to have the proverbial second bite of the cherry (see paras 28–30).

(3) **(per Azahar Mohamed CJ (Malaya), majority)** The applicants argued that the majority and supporting judgments were wrong or had been wrongly decided by the judges concerned through misinterpretation of the relevant statutes and case law and that there was judicial error in overruling and disturbing the findings of facts by the courts below. This was not a valid and legitimate basis to seek a review of the court's decision under r 137 of the RFC. The majority of the Federal Court was entitled to come to its decision even when such decision might be questioned whether on the law or on the facts. On the question of law, it was not for the review panel to resolve whether the panel that heard the appeals had interpreted or applied the law correctly or not for the reason that it was a matter of opinion (see para 17).

(4) **(per Azahar Mohamed CJ (Malaya), majority)** As reflected in the sealed order of the court, the three appeals were unmistakably decided by

a 3–1 majority who agreed that the appeals should be allowed and the orders of the courts below should be set aside. Although one of the three judges forming the majority declined to answer the three questions of law posed to the court, it could not be denied that for varying reasons the majority decided that the appeals should be allowed and the orders of the courts below should be set aside. It was not a 2–2 decision. At the time the judgment was pronounced, the Federal Court was properly constituted under the relevant provisions of the CJA, the decision of the majority was not a nullity and no injustice was caused to the applicants (see paras 21–23).

(5) **(per Azahar Mohamed CJ (Malaya), majority)** As to the argument that Justice Abu Samah in his supporting judgment erred in 'disturbing the findings of facts' of the court below, it was not for this court to consider whether the judge had or had not made a correct decision on the facts or law because that was a matter of opinion. A review was distinct from and should not be confused with an appeal. In a review, the court was primarily concerned not with the correctness of the decision under review. The emphasis on finality of litigation could not be overstated. Under no circumstances in a review application should the court position itself as if it were hearing an appeal and decide the case as such (see para 24).

(6) **(per Azahar Mohamed CJ (Malaya), majority)** As to the applicants' argument that the panel that heard the three appeals did not have a judge with 'Bornean judicial experience', this issue was never raised during the hearing of the appeals. More importantly, the law on this matter was now well settled. The Federal Court in *Keruntum Sdn Bhd v The Director of Forests & Ors* [2017] MLJU 2437; [2018] 4 CLJ 145 held that a litigant could not enforce the recommendation under para 26(4) of the IGC Report that normally the Federal Court when hearing an appeal from a case that originated from the Borneo States should be comprised of at least one judge with 'Bornean judicial experience'. This was because that recommendation was never implemented by legislative, executive or other action by the governments of the Federation of Malaya, Sabah or Sarawak and was never incorporated into the Federal Constitution. The decision in *Keruntum* was correct and should be followed. There was no valid reason for this panel to depart from it. Hence, the applicants' attempt to question the composition or quorum of the panel that heard the three appeals had no merit and must inevitably fail (see paras 25–27).

(7) **(per David Wong CJ (Sabah and Sarawak), dissenting)** From a reading of Justice Abu Samah's supporting judgment and Justice Zainun Ali's dissenting judgment, there was little doubt that Justice Abu Samah, in answering the central issue in the appeals, emphatically concurred with Justice Zainun Ali that the Iban customs of *pulau galau* and *pemakai*

menoa were part of Sarawak law. Premised on that ground, there was in fact no majority judgment by the panel of the four remaining judges; at best, it was a superficial majority with no legal standing. Such a circumstance did not create any finality as there was no certainty. There was an infringement of s 78 of the CJA, resulting in a coram failure which was a circumstance that warranted the exercise of the review power of the court under r 137 of the RFC. The rationale of r 137 reminded this court that the rendering of justice was just as important as the concept of finality of its judgment, more so in the instant case where the court was dealing with the constitutional rights of livelihood of the indigenous segment of our society (see paras 61, 73, 78 & 183–184).

(8) **(per David Wong CJ (Sabah and Sarawak), dissenting)** Justice Abu Samah had allowed the appeals on finding that the applicants had not adduced sufficient evidence at trial to support their claims on balance of probabilities, ie, they had not shown that they had exercised their rights to NCR by using the area of the disputed land to forage for food or forest produce, fishing or hunting; that, consequently, there was manifest error on the part of the courts below in judicially appreciating the evidence. Justice Abu Samah embarked on a fact-finding process and interfered with the findings of fact made by the High Court which were affirmed by the COA. The issue of 'evidential proof' by the applicants was never an issue before the Federal Court, nor was the factual existence and practice of the customs in issue. Justice Abu Samah failed to show where the manifest error in the judgment of the High Court was so as to justify interference in the fact-finding process of that court. In the circumstances, he had no jurisdiction to embark on his fact-finding. Accordingly, what Justice Abu Samah decided on the issue of proof must, with respect, be ignored (see paras 62–63, 65, 72 & 74).

(9) **(per David Wong CJ (Sabah and Sarawak), dissenting)** Although a mistake of law or fact by the court was not a ground for review, in the instant case it was more than a mistake of law or fact. Here was an allegation of coram failure under s 78 of the CJA and when there was reasonable doubt as to whether there was in fact a majority decision, benefit had to be given to the applicants whose constitutional rights as the indigenous peoples of this country was in dispute. The sanctity of any decision of the Federal Court had to be maintained and protected so that the public's confidence in its judgments remained high bearing in mind that whatever pronouncements that were made by the apex court became the law of the land. Hence, it was incumbent that where there was doubt as to the accuracy of any of its judgments, as in the instant review applications, it had to be corrected (see paras 76–77).

(10) **(per David Wong CJ (Sabah and Sarawak), dissenting)** The judges who rendered the 2016 judgment had never served at the High Court of

Sabah and Sarawak. Thus, there was a complete lack of a judge with 'Bornean judicial experience' in the panel that heard the three appeals, thereby occasioning a breach of s 74 of the CJA read in tandem with para 26(4) of the IGC Report qua article VIII of the Malaysia Agreement 1963. There was, accordingly, a coram failure for breach of s 74 of the CJA (see paras 153 & 167). A B

(11) **(per David Wong CJ (Sabah and Sarawak), dissenting)** There was ambiguity in s 74 of the CJA in that while it conferred on the Chief Justice ('CJ') the sole discretion to empanel the members of the Federal Court, there was no clear guideline as to how such discretion ought to be exercised. Since s 74 of the CJA was a quasi-constitutional provision, one had to look behind the words therein in the context of the Malaysia Agreement 1963 and related historical documents. Since s 74 was silent on the 'Bornean judicial experience' point, and there was no other express statutory guidance on how the CJ ought to exercise his/her discretion of empanelment, the general requirement of having a judge of Bornean judicial experience, vide para 26(4) of the IGC Report read in tandem with article VIII of the Malaysia Agreement 1963, ought to be read into s 74 of the CJA. Accordingly, s 74 imposed on the CJ a duty to ensure that a judge with Bornean judicial experience was a member of a panel that decided any appeal emanating from Sabah and Sarawak. A plain reading of article VIII of the Malaysia Agreement 1963 imposed an obligation on the Judiciary, as an organ of the State, to observe and implement the recommendations made in para 26(4) of the IGC Report. The common-sense approach was to construe the term 'or other action' in para 26(4) of the IGC Report as including the judicial branch of government. Giving para 26(4) its due effect and place in s 74 of the CJA would honour the terms and conditions agreed to by our founding fathers in the formation of Malaysia and enhance public confidence in the Judiciary (see paras 100, 105, 135 & 142–143). C D E F G

(12) **(per David Wong CJ (Sabah and Sarawak), dissenting)** The *Keruntum* judgment took a simplistic approach and ignored the importance and significance of the Malaysia Agreement 1963 and the IGC Report in the context of the formation of Malaysia. Assurances were given by the respective signatories to the Malaysia Agreement 1963 with the intention that the same would be implemented and given the sanctity they deserved since they formed the basis of the birth of a nation (see para 96). H

[Bahasa Malaysia summary

Pemohon-pemohon di sini, yang merupakan orang-orang Iban dan anak watan Sarawak, memohon kepada Mahkamah Persekutuan di bawah k 137 Kaedah-Kaedah Mahkamah Persekutuan 1995 ('KMP') untuk mengkaji semula dan mengetepikan keputusan majoritinya terhadap tiga rayuan yang difailkan oleh responden-responden. Pemohon-pemohon juga memohon I

perintah agar mahkamah mengekalkan dan mengesahkan penghakiman bertentnagan yang dibuat menyebelahi mereka dalam rayuan-rayuan itu; secara alternatif, agar rayuan-rayuan itu didengar semula. Rayuan-rayuan itu adalah terhadap keputusan Mahkamah Rayuan ('MR') yang mengesahkan penegasan Mahkamah Tinggi berhubung tuntutan pemohon-pemohon untuk hak adat anak watan ('HAAW') dan hak *usufructuary* ke atas tanah-tanah tertentu di Sarawak ('tanah tersebut'). Mahkamah Tinggi bukan sahaja memutuskan bahawa undang-undang Sarawak mengiktiraf adat anak watan iaitu *pemakai menoa* dan *pulau galau* tetapi juga mendapati bahawa pemohon-pemohon telah membuktikan atas imbangan kebarangkalian bahawa mereka telah mengamalkan adat anak watan itu atas tanah tersebut untuk melayakkan mereka menuntut HAAW dan hak *usufructuary* dan bahawa pajakan sementara yang telah diberikan oleh pihak berkuasa ke atas sebahagian daripada tanah kepada syarikat (Rosebay Enterprise Sdn Bhd) telah melanggar hak tersebut. MR mengesahkan dapatan mahkamah perbicaraan dan menolak rayuan responden-responden. Responden-responden telah diberikan kebenaran untuk merayu kepada Mahkamah Persekutuan terhadap keputusan MR mengenai tiga persoalan undang-undang. Satu panel lima hakim telah mendengar rayuan-rayuan Mahkamah Persekutuan secara bersama tetapi sebelum tarikh penyampaian keputusan, salah seorang daripada mereka telah bersara daripada perkhidmatan yang meninggalkan baki empat hakim yang berhak menyampaikan keputusan mahkamah menurut s 78(1) Akta Mahkamah Kehakiman 1964 ('AMK'). Walau bagaimanapun, s 78(2), memperuntukkan bahawa jika tidak ada keputusan majoriti oleh hakim-hakim yang kekal di mahkamah itu, rayuan-rayuan itu perlu didengar semula. Rayuan-rayuan itu dibenarkan oleh majoriti 3–1 (Hakim Zainun Ali menulis penghakiman yang menentang) mengakibatkan keputusan MR dan Mahkamah Tinggi diketepikan. Dua daripada hakim majoriti memutuskan bahawa undang-undang Sarawak tidak mengiktiraf adat anak watan pemakai menoa dan pulau galau dan mereka menjawab persoalan undang-undang yang ditujukan kepada mahkamah sewajarnya. Hakim yang kekal dalam majoriti ('Hakim Abu Samah') telah menulis penghakiman berasingan yang menolak untuk menjawab apa-apa persoalan tentang pemberian itu tetapi menyatakan beliau membenarkan rayuan-rayuan itu atas dasar bahawa, berdasarkan keseluruhan keterangan, 'there was no sufficient evidence to support the claims by the plaintiffs (applicants) on the balance of probabilities' dan, oleh demikian, mahkamah bawahan telah melakukan 'manifest error in judicial appreciation of the evidence'. Dalam permohonan semakan semula, pemohon-pemohon berpendapat bahawa: (a) mereka telah mengalami ketidakadilan kerana sebenarnya ada dan tidak ada keputusan majoriti 3–1 kerana penghakiman menyokong Hakim Abu Samah bersetuju dengan penghakiman menentang Hakim Zainun Ali; bahawa beliau hanya berbeza atas alasan bahawa pemohon-pemohon tidak mempunyai fakta/keterangan bagi membuktikan tuntutan mereka terhadap tuntutan HAAW ke atas tanah tersebut. Pemohon-pemohon dengan itu menegaskan bahawa berdasarkan

undang-undang (iaitu, sama ada undang-undang Sarawak mengiktiraf adat anak watan pemakai menoa dan pulau galau) keputusan Mahkamah Persekutuan dibahagikan secara sama rata (2–2) dan rayuan-rayuan itu sepatutnya telah didengar menurut s 78(2) AMK; (b) mereka juga mengalami ketidakadilan akibat kegagalan Ketua Hakim Negara, di bawah s 74 AMK, untuk memasukkan sekurang-kurangnya seorang hakim dengan 'Bornean judicial experience' dalam panel yang mendengar rayuan-rayuan itu (memandangkan hal perkara berkenaan adalah pertikaian yang timbul daripada Negeri-Negeri Borneo) agar selaras dengan perenggan 26(4) Laporan Jawatankuasa Antara Kerajaan ('IGC') 1962 dibaca bersama dengan artikel VIII Perjanjian Malaysia 1963; dan (c) penghakiman majoriti telah menjelaskan pendapat yang salah dari segi undang-undang.

Diputuskan, melalui majoriti, menolak permohonan-permohonan semakan semula:

(1) **(oleh Azahar Mohamed CJ (Malaya), majoriti)** Bidang kuasa sedia ada Mahkamah Persekutuan untuk menyemak semula keputusannya hanya boleh dilaksanakan dalam keadaan yang terhad untuk mengelakkan ketidakadilan atau penyalahgunaan proses mahkamah. Pemohon perlu berupaya menunjukkan atas rekod bahawa terdapat ketidakadilan. Kuasa sedia ada tidak boleh digunakan untuk menyemak semula keputusan mahkamah atas mertinya dan tidak boleh dalam apa-apa keadaan patut mahkamah mendengar permohonan semakan semula sepertimana jika ia mendengar rayuan dan memutuskan kes sedemikian. Jika tidak, litigasi tiada akhirnya. Kemuktamadan prosiding adalah penting untuk kepastian pentadbiran undang-undang. Demi kepentingan awam dan pentadbiran keadilan mesti ada kemuktamadan tindakan undang-undang (lihat perenggan 12–13).

(2) **(oleh Azahar Mohamed CJ (Malaya), majoriti)** Atas rekod, tidak ditunjukkan bahawa terdapat ketidakadilan. Permohonan semakan semula ini adalah satu percubaan untuk melitigasi semula merit yang substantif tiga rayuan tersebut dan membuka semula serta memeriksa semula keputusan muktamad mahkamah dan agar satu panel lain membatalkan keputusan majoriti dan mengekalkan penghakiman minoriti. Pemohon-pemohon mencuba nasib untuk kali kedua (lihat perenggan 28–30).

(3) **(oleh Azahar Mohamed CJ (Malaya), majoriti)** Pemohon-pemohon berhujah bahawa penghakiman majoriti dan sokongan adalah salah atau telah diputuskan secara salah oleh hakim-hakim berkenaan oleh kerana salah tafsiran statut dan undang-undang kes berkaitan dan terdapat kekhilafan kehakiman dalam membatalkan dan mengganggu dapatan fakta oleh mahkamah bawahan. Ini bukan asas yang sah dan dari segi undang-undang sah untuk memohon suatu semakan semula untuk

keputusan mahkamah di bawah k 137 KMP. Majoriti Mahkamah Persekutuan berhak membuat keputusannya meskipun keputusan tersebut mungkin dipersoalkan sama ada dari segi undang-undang atau fakta. Dari segi undang-undang, ia bukan untuk panel semakan semula untuk menyelesaikan sama ada panel yang mendengar rayuan-rayuan tersebut telah mentafsir atau mennggguna pakai undang-undang dengan betul atau tidak oleh sebab ia adalah suatu perkara tentang pendapat (lihat perenggan 17).

(4) **(oleh Azahar Mohamed CJ (Malaya), majoriti)** Sebagaimana ditunjukkan dalam perintah mahkamah yang dimeterai, tiga rayuan tersebut sememangnya telah diputuskan oleh majoriti 3–1 yang bersetuju agar rayuan-rayuan tersebut patut dibenarkan dan perintah-perintah mahkamah bawahan patut diketepikan. Walaupun salah seorang daripada tiga hakim yang membentuk majoriti itu enggan untuk menjawab tiga persoalan undang-undang yang dikemukakan kepada mahkamah, ia tidak boleh dinafikan bahawa oleh kerana pelbagai sebab majoriti tersebut telah memutuskan yang rayuan-rayuan tersebut patut dibenarkan dan perintah-perintah mahkamah bawahan patut diketepikan. Ia bukan keputusan 2–2. Pada masa penghakiman itu disampaikan, Mahkamah Persekutuan telah ditubuhkan sewajarnya di bawah peruntukan berkaitan AMK, keputusan majoriti tersebut tidak terbatal dan tidak berlaku ketidakadilan terhadap pemohon-pemohon (lihat perenggan 21–23).

(5) **(oleh Azahar Mohamed CJ (Malaya), majoriti)** Berhubung hujah bahawa Hakim Abu Samah dalam penghakiman sokongannya telah terkhilaf kerana 'disturbing the findings of facts' mahkamah bawahan, ia bukan untuk mahkamah ini mengambil kira sama ada hakim itu telah atau tidak membuat keputusan yang betul atas fakta atau undang-undang kerana ia ia suatu perkara tentang pendapat. Semakan semula adalah berbeza dari dan tidak boleh dikelirukan dengan rayuan. Dalam semakan semula, mahkamah terutamanya tidak mengambil berat tentang ketepatan keputusan yang sedang disemak semula. Penekanan ke atas kemuktamadan tindakan undang-undang tidak dapat diabaikan. Dalam apa jua keadaan dalam permohonan semakan semula, kedudukan mahkamah sendiri meletakkan kedudukannya seolah-olah ia telah mendengar rayuan dan memutuskan kes itu (lihat perenggan 24).

(6) **(oleh Azahar Mohamed CJ (Malaya), majoriti)** Berhubung hujah pemohon bahawa panel yang mendengar ketiga-tiga rayuan itu tidak mempunyai seorang hakim dengan 'Bornean judicial experience', isu ini tidak pernah dibangkitkan semasa rayuan-rayuan itu didengar. Lebih penting lagi, undang-undang mengenai perkara ini telah diselesaikan dengan baik. Mahkamah Persekutuan dalam kes *Keruntum Sdn Bhd v The Director of Forests & Ors* [2017] MLJU 2437; [2018] 4 CLJ 145

memutuskan bahawa litigan tidak boleh menguatkuasakan cadangan di bawah perenggan 26(4) dalam Laporan IGC yang mana biasanya Mahkamah Persekutuan apabila mendengar rayuan daripada kes yang berasal dari Negeri-Negeri Borneo hendaklah terdiri daripada sekurang-kurangnya seorang hakim dengan 'Bornean judicial experience'. Ini adalah kerana syor tersebut tidak pernah dilaksanakan oleh Perundangan, Eksekutif atau tindakan lain oleh Kerajaan Persekutuan Tanah Melayu, Sabah atau Sarawak dan tidak pernah dimasukkan ke dalam Perlembagaan Persekutuan. Keputusan dalam kes *Keruntum* adalah betul dan harus diikuti. Tidak ada alasan yang sah untuk panel ini untuk menyimpang daripadanya. Oleh itu, percubaan pemohon untuk mempersoalkan komposisi atau korum panel yang mendengar ketiga-tiga rayuan itu tidak mempunyai merit dan sewajarnya gagal (lihat perenggan 25–27).

(7) **(oleh David Wong CJ (Sabah and Sarawak), menentang)** Daripada bacaan penghakiman sokongan Hakim Abu Samah dan penghakiman menentang Hakim Zainun Ali daripada, terdapat sedikit keraguan bahawa Hakim Abu Samah, dalam menjawab isu utama dalam rayuan-rayuan itu, dengan tegas bersetuju dengan Hakim Zainun Ali bahawa adat Iban iaitu *pulau galau* dan *pemakai menoa* adalah sebahagian daripada undang-undang Sarawak. Berlandaskan atas alasan itu, sebenarnya tidak terdapat penghakiman majoriti oleh panel empat hakim yang tinggal; paling baik, ia adalah majoriti superfisial tanpa kedudukan undang-undang. Keadaan sedemikian tidak mewujudkan sebarang kesudahan kerana tidak ada kepastian. Terdapat pelanggaran terhadap s 78 AMK, mengakibatkan kegagalan koram yang merupakan keadaan yang menjamin pelaksanaan kuasa semakan semula mahkamah di bawah k 137 KMP. Rasional k 137 mengingatkan kepada mahkamah ini bahawa penyesuaian keadilan adalah sama pentingnya dengan konsep kemuktamadan penghakimannya, lebih-lebih lagi dalam kes ini di mana mahkamah berurusan dengan hak perlembagaan tentang segmen kehidupan masyarakat pribumi ini (lihat perenggan 61, 73, 78 & 183–184).

(8) **(oleh David Wong CJ (Sabah and Sarawak), menentang)** Hakim Abu Samah telah membenarkan rayuan-rayuan itu kerana mendapati bahawa pemohon-pemohon tidak mengemukakan bukti yang mencukupi untuk dibicarakan bagi menyokong tuntutan mereka atas imbangan kebarangkalian, iaitu, mereka tidak menunjukkan bahawa mereka telah melaksanakan hak mereka terhadap HAAW dengan menggunakan kawasan tanah yang dipertikaikan untuk mencari makanan atau hasil hutan, memancing atau memburu; bahawa, akibatnya, terdapat kesilapan nyata di pihak mahkamah bawahan secara adil menghargai keterangan itu. Hakim Abu Samah memulakan proses mencari fakta dan mengganggu penemuan fakta yang dibuat oleh Mahkamah Tinggi yang

telah disahkan oleh MR. Isu 'evidential proof' oleh pemohon-pemohon tidak pernah menjadi isu di hadapan Mahkamah Persekutuan, mahupun terdapat kewujudan faktual dan amalan adat yang menjadi isu. Hakim Abu Samah gagal menunjukkan di mana kesilapan nyata dalam penghakiman Mahkamah Tinggi untuk membenarkan campurtangan dalam proses mencari fakta mahkamah itu. Dalam keadaan itu, beliau tidak mempunyai bidang kuasa untuk memulakan penemuan fakta. Oleh itu, apa yang Hakim Abu Samah memutuskan mengenai isu bukti mestilah, dengan hormat, diabaikan (lihat perenggan 62–63, 65, 72 & 74).

(9) **(oleh David Wong CJ (Sabah and Sarawak), menentang)** Walaupun kesilapan undang-undang atau fakta oleh mahkamah bukanlah alasan untuk semakan, dalam kes ini ia lebih daripada kesilapan undang-undang atau fakta. Berikut adalah dakwaan kegagalan koram di bawah s 78 AMK dan apabila terdapat keraguan munasabah sama ada sebenarnya terdapat keputusan majoriti, manfaat harus diberikan kepada pemohon yang hak perlembagaannya sebagai anak watan di negara ini adalah dipertikaikan. Kesucian keputusan Mahkamah Persekutuan perlu dikekalkan dan dilindungi supaya keyakinan orang ramai terhadap penghakimannya tetap tinggi dengan mengambil kira bahawa apa-apa pengumuman yang dibuat oleh mahkamah tertinggi menjadi undang-undang tanah itu. Oleh itu, adalah penting bahawa jika ada keraguan tentang ketepatan mana-mana penghakimannya, seperti dalam permohonan semakan semula ini, ia perlu diperbetulkan (lihat perenggan 76–77).

(10) **(oleh David Wong CJ (Sabah and Sarawak), menentang)** Para hakim yang membuat penghakiman 2016 tidak pernah berkhidmat di Mahkamah Tinggi Sabah dan Sarawak. Oleh itu, tidak terdapat hakim yang lengkap dengan 'Bornean judicial experience' dalam panel yang mendengar ketiga-tiga rayuan itu, oleh demikian menyebabkan pelanggaran s 74 AMK dibaca selaras dengan perenggan 26(4) Laporan IGC qua artikel VIII Perjanjian Malaysia 1963. Oleh itu, terdapat kegagalan koram kerana melanggar s 74 AMK (lihat perenggan 153 & 167).

(11) **(oleh David Wong CJ (Sabah and Sarawak), menentang)** Terdapat kekaburan dalam s 74 AMK kerana walaupun yang memberi budi bicara mutlak kepada Ketua Hakim ('KH') untuk mengecilkan ahli-ahli Mahkamah Persekutuan, tidak ada garis panduan yang jelas tentang bagaimana kebijaksanaan sedemikian patut dilaksanakan. Oleh kerana s 74 AMK adalah peruntukan kuasi-perlembagaan, seseorang perlu melihat di sebalik kata-kata dalam konteks Perjanjian Malaysia 1963 dan dokumen-dokumen sejarah yang berkaitan. Oleh sebab s 74 tidak menyebut perkara tentang 'Bornean judicial experience', dan tidak ada

lagi garis panduan berkanun yang jelas tentang bagaimana KH patut melaksanakan budi bicaranya, keperluan umum untuk mempunyai seorang hakim yang mempunyai pengalaman kehakiman di Bornea, menurut perenggan 26(4) Laporan IGC dibaca selaras dengan artikel VIII Perjanjian Malaysia 1963, hendaklah dibaca dengan s 74 AMK. Oleh itu, s 74 meletakkan kewajipan ke atas KH untuk memastikan bahawa seorang hakim yang mempunyai pengalaman kehakiman di Borneo adalah seorang ahli panel yang memutuskan apa-apa rayuan yang berasal dari Sabah dan Sarawak. Bacaan harfiah artikel VIII Perjanjian Malaysia 1963 meletakkan kewajipan ke atas badan kehakiman, sebagai organ negara, untuk mematuhi dan melaksanakan cadangan yang dibuat dalam perenggan 26(4) Laporan IGC. Pendekatan yang logik adalah untuk mentafsir istilah 'or other action' dalam perenggan 26(4) Laporan IGC sebagai termasuk cawangan kehakiman Kerajaan. Memberi perenggan 26(4) kesan dan tempat yang sesuai dalam s 74 AMK akan menghormati terma dan syarat yang dipersetujui oleh bapa pengasas pembentukan Malaysia dan meningkatkan keyakinan orang ramai terhadap badan kehakiman (lihat perenggan 100, 105, 135 & 142–143).

(12) **(oleh David Wong CJ (Sabah and Sarawak), menentang)** Penghakiman *Keruntum* mengambil pendekatan mudah dan tidak menghiraukan kepentingan dan signifikan Perjanjian Malaysia 1963 dan Laporan IGC dalam konteks pembentukan Malaysia. Jaminan yang diberikan oleh para penandatangan Perjanjian Malaysia 1963 masing-masingnya dengan niat bahawa yang sama akan melaksanakan dan memberi kesucian yang patut mereka terima memandangkan mereka telah membina asas kepada kelahiran negara (lihat perenggan 96).]

Notes

For cases on appeal to Federal Court, see 2(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1000–1034.

For cases on Federal Court, see 3(2) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 2650–2661.

Cases referred to

AirAsia Bhd v Rafizah Shima bt Mohamed Aris [2014] 5 MLJ 318, CA (refd)

Amalan Tepat Sdn Bhd v Panflex Sdn Bhd [2012] 2 MLJ 168; [2012] 2 CLJ 687, FC (refd)

Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal) (Judgment) [1991] ICJ Rep 53 (refd)

Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia Bhd) [2008] MLJU 251; [2008] 6 CLJ 1, FC (refd)

Balasingham v PP [1959] 1 MLJ 193 (refd)

A *Basheshar Nath v Commissioner of Income Tax, Delhi and Rajasthan* [1959] AIR (SC) 149, SC (refd)
Bato Bagi & Ors v Kerajaan Negeri Sarawak and another appeal [2011] 6 MLJ 297; [2011] 8 CLJ 766, FC (refd)
Behram Khurshid Pesikaka vs The State of Bombay [1955] 1 SCR 613, SC (refd)
B *Bellajade Sdn Bhd v CME Group Bhd and another appeal* [2019] 5 MLJ 141; [2019] 8 CLJ 1, FC (refd)
Canadian Security Intelligence Service Act (Re) [2008] 4 FCR; 2008 230 FC 301, FC (refd)
CAS v MPPL & Anor [2019] 4 MLJ 243; [2019] 2 CLJ 454, CA (refd)
C *Chan Yock Cher v Chan Teong Peng* [2005] MLJU 673; [2005] 4 CLJ 29, FC (refd)
Cohens v Virginia (1821) 19 U.S. 264, SC (refd)
Cole v Whitfield (1988) 78 ALR 42, HC (refd)
Datuk Hj Mohammad Tufail bin Mahmud & Ors v Dato Ting Check Sii [2009]
D 4 MLJ 165, FC (refd)
Fitzleet Estates Ltd v Cherry (Inspector of Taxes) [1977] 1 WLR 1345, HL (refd)
Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals [2018] 1 MLJ 545, FC (refd)
Jeli ak Naga & Ors (suing on behalf of themselves and on behalf of all the residents
E *of the longhouse known as Rumah Jeli ak Naga, Rumah Rajit ak Ambas, Rumah Jambai ak Jali, Rumah Edward Ekau ak Simbeng and Rumah Duat ak Kalom and/or all other proprietors, occupiers, holders or claimants of native customary right lands situated at or around Sungai Sibuti, Sungai Bakas and Sungai Kelitang, Sibuti, Sarawak) v Tung Huat Pelita Niah Plantation Sdn Bhd & Ors*
F *and another appeal* [2018] 12 MLJ 134; [2018] 1 LNS 1464, CA (refd)
Kerajaan Malaysia v Semantan Estates (1952) Sdn Bhd [2019] 2 MLJ 609; [2019] 2 CLJ 145, FC (refd)
Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors [2005] 6 MLJ 289; [2005] 4 CLJ 169, CA (refd)
G *Keruntum Sdn Bhd v The Director of Forest & Ors* [2017] MLJU 2437; [2018] 4 CLJ 145, FC (folld)
Lavigne v Canada (Office of the Commissioner of Official Languages) [2002] SCJ No 55, SC (refd)
MPPL v Anor v CAS (Appeal No 02(f)-14–03 of 2018(W)) (unreported), FC
H (refd)
Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia [1999] 2 MLJ 337, FC (refd)
Minister for Immigration and Ethnic Affairs v Teoh (1995) 128 ALR 353, HC (refd)
I *New South Wales v Commonwealth of Australia* [2006] HCA 52, HC (refd)
Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal [2005] 3 MLJ 97, FC (refd)
PP v Azmi bin Sharom [2015] 6 MLJ 751, FC (refd)

PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393, FC (refd)
R v Hape [2007] 2 SCR 292, SC (refd)
Review Publishing Co Ltd and another v Lee Hsien Loong and another appeal [2010] 1 SLR 52, CA (refd)
Reynolds v Times Newspapers Ltd and others [2001] 2 AC 127, HL (refd)
Rupa Ashok Hurra v Ashok Hurra & Anor SCC (2002) 4 SCC 388, SC (refd)
Salomon v Commissioners of Customs and Excise [1966] 3 All ER 871, CA (refd)
Superintendent of Land & Surveys Miri Division & Anor v Madeli bin Salleh (suing as Administrator of the Estate of the deceased, Salleh bin Kilong) [2008] 2 MLJ 677; [2007] 6 CLJ 509, FC (refd)
Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal [2006] 1 MLJ 256; [2005] 3 CLJ 555, CA (refd)
The Government of the State of Kelantan v The Government of the Federation of Malaya and Tunku Abdul Rahman Putra Al-haj [1963] 1 MLJ 355 (refd)

Legislation referred to

Child Act 2001
Commonwealth Constitution [AUS] s 51
Courts of Judicature Act 1964 ss 4, 23, 24, 69, 74, 74(1), 77, 78, 78(1), (2), 96, Part IV
Federal Constitution arts 10(2), 121, 122(1A), 128, 153, 160, 160(2), 161A, 161B
Land Code (Cap 81) s 5(2)
Malaysia Act 1963
Rules of the Federal Court 1995 r 137
Sedition Act 1948
Subordinate Courts Act 1948
Supreme Court of Judicature Act [SG]
Workplace Relations Act 1996 [AUS]

Joshua Baru (Clarice Chan Mei Chin and Yogeswaran Subramaniam with him) (Baru Bian Advocates) for the applicants.
JC Fong (McWillyn Jiok with him) (Sarawak State Attorney General's Chambers) in Civil Application No 08(RS)–3–03 of 2019(Q) for the respondents.
George Lim (Christine Lim with him) (Battenberg & Talma Advocates) in Civil Application No 08(RS)-4–03 of 2019–27(Q) for the respondent.

Azahar Mohamed CJ (Malaya) (delivering majority judgment of the court):

[1] My learned sister Justice Alizatul Khair Osman Khairuddin, and my learned brothers Justice Mohd Zawawi Salleh and Justice Idrus Harun have read this judgment in draft and have expressed their agreement with it. My learned brother Justice David Wong Dak Wah holds a different view and has

written a separate dissenting judgment.

[2] These three related applications were filed by the applicants under r 137 of the Rules of the Federal Court 1995 ('the RFC') seeking for this court to review and to set aside its own decision, which was delivered on 20 December 2016 in Federal Court Civil Appeals Nos 01(f)-27–04 of 2015(Q) ('Appeal No 27'), 01(f)-30–04 of 2015(Q) ('Appeal No 30') and 02(f) 42–06 of 2015(Q) ('Appeal No 42') ('the three appeals').

[3] The three appeals were heard jointly by a panel of five judges of this court comprised of Raus Sharif PCA (as His Lordship then was), Abdull Hamid Embong FCJ, Ahmad Maarop FCJ (as His Lordship then was), Zainun Ali FCJ and Abu Samah Nordin FCJ.

[4] Briefly, the appellants in the three appeals appealed against the decision of the Court of Appeal that affirmed the decision of the High Court by granting the respondent and the others that he represented, native customary rights ('NCR') over the entire lease, which the State Government of Sarawak had granted to Rosebay Enterprise Sdn Bhd. The respondents in the three appeals were Ibans and natives of Sarawak.

[5] In Appeal No 27, the respondents claimed for an area measuring 5,639 hectares of land by alleging that they had acquired NCR over the claimed area by virtue of their 'adat' or custom of the Ibans termed as 'pemakai menoa' and 'pulau galau' and also by virtue of the principle of common law. The term 'pemakai menoa' and 'pulau galau' mentioned in the court proceedings can be defined as an area of land held by a distinct longhouse or village community that includes farms, gardens, fruit groves, cemetery, water, and forest within a defined boundary (*garis menua*). 'Pemakai menoa' also includes 'temuda' (cultivated land that has been left to fallow); 'tembawai' (old longhouse sites); and 'pulau' (patches of virgin forest that have been left uncultivated to provide the community with forest resources for domestic use). The appellants conceded that the respondents had valid NCR to an area measuring 2,802 hectares of land comprising of cleared and cultivated land but disputed their claim for the balance area of the land.

[6] In Appeal Nos 30 and 42, the respondents claimed that the provisional lease of state land that the authorities had granted to Rosebay Enterprise Sdn Bhd had infringed their NCR, which they had acquired since the 1800s. The High Court judge held that the natives in the respective cases had acquired native customary rights and usufructuary rights over the claimed area through the Iban customs of 'pemakai menoa' and 'pulau'. Besides, the fact that the Iban

customs of 'pemakai menoa' and 'pulau' were not codified did not mean that such a custom was no longer a custom, unless there were clear unambiguous words to repeal or reject the customs. It was further decided that the native's custom of 'pemakai menoa' and 'pulau' were NCR having the recognition of law within the meaning of art 160 of the Federal Constitution.

[7] The Court of Appeal upheld the decision of the High Court and ruled that the definition of 'law' in art 160(2) of the Federal Constitution which includes written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof meant that common law applied in the State of Sarawak; and the common law applicable in Sarawak recognised the customary rights of the respondents known as 'pemakai menoa' and 'pulau' which existed and had been recognised since 1800s and had not been expressly repealed by subsequent legislation.

[8] Leave to appeal to the Federal Court was granted by this court to the appellants in the three appeals on the following identical questions of law:

(a) whether the pre-existence of rights under native laws and customs which the common law respects include rights to land in the virgin/primary forests which the natives, like the respondents and their ancestors (who are Iban by race), had not felled or cultivated but were forests which they have reserved for food and forest produce? *(Question 1)*

(b) whether the High Court and the Court of Appeal are entitled to uphold a claim for native customary rights to land in Sarawak based on a native custom (namely) 'pemakai menoa' and/or 'pulau' where:

  (i) there is no proof that such custom was practised amongst the native communities (particularly amongst the Ibans) for the creation of rights to land prior to the arrival of the first Rajah in 1841;

  (ii) such a custom was never reflected or recognised as having been practised by the native communities in relation to the creation of rights to land, in any of the orders made and legislations passed by or during the Brooke era or by the Legislature of Sarawak; and

  (iii) such a custom was never part of or recognised in 'Tusun Tunggu' and the Adat Iban 1993, which declared, pursuant to the Native Customary Laws Ordinance, the customary laws of the Iban community in Sarawak. *(Question 2)*

(c) whether the Court of Appeal's decision in *Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal* [2006] 1 MLJ 256; [2005] 3 CLJ 555 that the rights of the natives is confined to

A the area where they settled and not where they foraged for food is a correct statement of the law relating to the extent and nature of rights to land claimed under native customary rights in Sarawak. *(Question 3)*

B **[9]** On 20 December 2016, the Federal Court allowed the three appeals with a 3–1 majority (Zainun Ali FCJ dissenting). At the time of delivery of judgment, Abdull Hamid Embong FCJ had retired. Judgment of the Federal Court was delivered pursuant to s 78(1) of the Courts of Judicature Act 1964 ('the CJA') by the remaining four judges on the panel.

C **[10]** The remaining members of the panel delivered three separate written judgments:

(a) a majority judgment by Raus Sharif PCA which was agreed to by Ahmad Maarop FCJ which gave answers to the questions of law posed for
D determination by the Federal Court, which resulted in the three appeals being allowed and the orders of the courts below been set aside. Question 1 was answered in the negative. The pre-existence of rights under native laws and custom which the common law respects did not include rights to land in the primary forest which natives, like the
E respondents or their ancestors, had not felled or cultivated but were forests which they reserved for food and forest produce. As for question 2, the High Court and the Court of Appeal were not entitled to uphold a claim for NCR to land in Sarawak based on a native custom of 'pemakai menoa' and 'pulau'. What the law of Sarawak recognised in a claim for
F NCR was the custom or adat of 'temuda'. Question 3 was answered in the affirmative. The decision in *Nor Anak Nyawai* that the rights of the native is confined to the area where they settled and not where they foraged for food was a correct statement of the law relating to the extent of native rights to land claimed under the NCR in Sarawak;

G (b) a supporting judgment by Abu Samah Nordin FCJ which declined to answer the three questions of law but allowed the three appeals on the grounds that 'there was manifest error in judicial appreciation of the evidence' and on the facts, the appeals ought to be allowed and the orders of the court below be set aside. There was no evidence in Appeal No 27
H that the primary forest had been cleared for cultivation or farming, nor was there any evidence of human activities. The area covered by the timber license could not be the area known as 'pulau' under the native customary law. As for Appeal Nos 30 and 42, the respondents' case was that the disputed land had been cleared but evidence actually showed that
I substantial area of the land was still under primary forest in 1951 and 1953; and

(c) as for dissenting judgment by Zainun Ali FCJ, in summary, the learned

judge after providing answers to the three questions of law, concluded, inter alia, that 'pemakai menoa' or 'pulau' continues to exist from time immemorial in the community of Iban. Such custom is certain, reasonable and acceptable by the community and it must be upheld and recognised and upheld by the court. Her Ladyship dismissed the three appeals and affirmed the orders of the courts below. Question 1 was answered in the affirmative. The existence of 'pemakai menoa' or 'pulau' was made out on the evidence. The pre-existence of rights under native laws and customs which the common law respects includes rights to land in the virgin/primary forests which the natives reserve for food and forest produce. Question 2 is at odds with principles and if at all, need not be answered. A claim for NCR to land shall fall along a spectrum with respect to their degree of connection with the land. Question 3 was answered in the negative.

[11] As indicated earlier, the applicants, who were all the respondents in the three appeals, have now filed three separate applications under r 137 of the RFC for the following orders:

(a) an order that the majority and/or supporting judgments of the Federal Court delivered on the 20 December 2016 in the three appeals, be set aside and the dissenting judgment be upheld and affirmed;

(b) further and/or in the alternative, an order under s 78(2) of the Courts of Judicature Act 1964 for the rehearing of the three appeals; and

(c) such further and other directions as this court deems fit and proper.

[12] The starting point of any discussion on this court's review powers is r 137 of the RFC which provides as follows:

> Inherent powers of the Court
>
> For the removal of doubts it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

[13] The legal principles in respect of this court's review powers under r 137 of the RFC have been meticulously and comprehensively summarised in this court's recent judgment in *Kerajaan Malaysia v Semantan Estates (1952) Sdn Bhd* [2019] 2 MLJ 609; [2019] 2 CLJ 145, which was delivered by Ahmad Maarop PCA. At paras 51–57 of the judgment, in discussing the scope of r 137 of the RFC, His Lordship reviewed all the leading cases on this court's review powers. The basic legal principle that can be gleaned from the review of the cases is that the inherent jurisdiction to review must be exercised in very limited

circumstances. The power to review is to be exercised sparingly, and only in circumstances which can be described as 'exceptional' and which therefore override the imperative of finality. The apex court has inherent powers, by virtue of its character as a court of justice, to correct its own mistakes in order to prevent miscarriages of justice. The underlying principle for a review is that it must be to prevent injustice, and that the applicant must be able to show on the face of the record that there was injustice. The inherent power of this court cannot be invoked to review its own decision on its merits. Rule 137 of the RFC does not confer any power or jurisdiction on the Federal Court to hear appeal. Under no circumstances should the panel of this court, which hears the review application place itself as if it were hearing an appeal and decide the case as such. Otherwise, an unsuccessful party in an appeal may try its luck before another panel that may disagree with the view of the earlier panel. If he is successful in having the order reversed, the other party will do the same thing again and there will be no finality to litigation. Finality of proceedings is of fundamental importance to the certainty of the administration of law. It is in the interests of the public and the administration of justice that there must be finality to litigation. It must be noted that the Federal Court stands as the apex court in the administration of justice in our country. No further appeal shall lie from the decision of the Federal Court.

[14] It is with the above principles in mind that we address the present review applications.

[15] At the hearing before us, the applicants have raised a number of grounds in support of the review applications. For convenience, we shall deal with each of them in turn under three principal grounds.

[16] First, it was argued for the applicants that the majority judgment had arrived at the wrong result in failing to understand the pre-existence of rights to land under native laws and customs, which the common law respect, in the primary forests that they had not felled or cultivated but which they reserved for food and forest produce. It was argued that the majority failed to consider the Court of Appeal decision in *Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors* [2005] 6 MLJ 289; [2005] 4 CLJ 169 which the applicants contend provided a correct statement of the law relating to the extent of native rights to land under native customary rights in Sarawak. The applicants added that the majority judgment misinterpreted the decision of the Federal Court in *Superintendent of Land & Surveys Miri Division & Anor v Madeli bin Salleh (suing as Administrator of the Estate of the deceased, Salleh bin Kilong)* [2008] 2 MLJ 677; [2007] 6 CLJ 509; the legal meaning of the phrase 'having the force of law' in art 160(2) of the Federal Constitution; and the 'Tusun Tunggu' and

the Adat Iban, 1993 and s 5(2) of the Land Code of Sarawak. It was argued that 'pemakai menoa' or 'pulau' continues to exist from time immemorial in the community of Iban. Such custom is certain, reasonable and acceptable by the community of Iban and it must be upheld and recognised and upheld by the court.

[17] As it can be understood from the submissions of the applicants, the main thrust in respect of the first ground is that the majority judgment erred in law and had made various obvious errors. It was contended that the majority judgment went against the weight of legal authorities from within and outside our jurisdictions on native rights to land. The applicants' complaints are that the majority and supporting judgments were wrong or have been wrongly decided by the judges concerned through misinterpretation of the relevant statutes and case law, and commission of judicial error in overruling and disturbing findings of facts by the courts below. In substance, the applicants were unhappy with the decision of the majority of the Federal Court where it refused to uphold their claim of the Iban customs of 'Pemakai Menoa' through the establishment of 'Pulau'. In our opinion, this is not a valid and legitimate basis to seek a review of the Federal Court decision. They together cannot constitute grounds for a review under r 137 of the RFC. The important point to make is this. The majority of the Federal Court was entitled to come to its decision even when such decision maybe questioned, whether in law or on facts. On question of law, it is not for the review panel to resolve whether the earlier panel in the same case, interpreted or applied the law correctly or not for the reason that it is a matter of opinion. In the words of Abdul Hamid Mohamad CJ in *Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia Bhd)* [2008] MLJU 251; [2008] 6 CLJ 1:

> In an application for a review by this court of its own decision, the court must be satisfied that it is a case that falls within the limited grounds and very exceptional circumstance in which a review may be made. Only if it does, that the court reviews its own earlier judgment. Under no circumstances should the court position itself as if it were hearing an appeal and decide the case as such. In other words, it is not for the court to consider whether this court had or had not made a correct decision on the facts. That is matter of opinion. Even on the issue of law, it is not for this court to determine whether this court had earlier, in the same case, interpreted or applied the law correctly or not. That too is a matter of opinion. In occasion that I can think of where this court may review its own judgment in the same case on question of law is where the court had applied a statutory provision that has been repealed. I do not think that review power should be exercised even where the earlier panel had followed certain judgments and not the others or had overlooked the others. Not even where the earlier panel had disagreed with the court's earlier judgments. If a party is dissatisfied with a judgment of this court that does not follow the court's own earlier judgments, the matter may be taken up in another appeal in a similar case. That is what is usually called revisiting'. Certainly, it should not be taken up in

A the same case by way of a review. That had been the practice of this court all these years and it should remain so. Otherwise, there will be no end to litigation. A review may lead to another review and a further review. This court has so many times warned against such attempts.

B **[18]** In *Chan Yock Cher v Chan Teong Peng* [2005] MLJU 673; [2005] 4 CLJ 29, the Federal Court held:

> Coming back to the present application. It has been seen that the applicant questions the findings of this court both in law and on facts. These are matters of opinion. Just because we may disagree (we do not say whether we agree or disagree with such findings) with the earlier panel of this court, that is not a ground that warrants us to review the decision. Similarly, regarding the interpretation and application of some provisions of the Companies Act 1969, even if we disagree with the earlier panel (again we do not say whether we agree or disagree) that does not warrant us to set aside the judgment and the order of the earlier panel of this court and re-hear and review the appeal. Otherwise, as has been said, there would be no end to a proceeding.

[19] This brings us to the second ground. It was argued that the supporting judgment of Abu Samah Nordin FCJ erred in 'disturbing the findings of facts' of the learned trial judge, which were in favour of the applicants and thereby caused injustice to the applicants by not answering the three questions of law posed for determination by the Federal Court. First and foremost, it is important to bear in mind that the Federal Court had reversed the decisions of the Court of Appeal and the High Court and allowed the appeal with a 3–1 majority. Another significant matter that must be noted is that Abu Samah Nordin FCJ in his supporting judgment had agreed with the conclusion arrived at by Raus Sharif PCA who delivered the majority judgment of the court. This is clearly mentioned in the supporting judgment of Abu Samah Nordin FCJ. In the words of the learned judge:

> [23] I have the benefit of reading the judgment of Justice Raus Sharif PCA. The plaintiffs' claims to the disputed land is based on the native customary rights known as *pemakai menoa* and *pulau*. The central issue is whether the native customary rights known to the Iban community as pemakai menoa and pulau are recognised by the laws of Sarawak. If they are recognised by the laws of Sarawak, the next question is whether the plaintiffs have established their claims to the disputed land based on the native custom of pemakai menoa or pulau. This is a question of facts to be decided based on the evidence available before the court.
>
> [24] On the facts of the case, I agree with Justice Raus Sharif, PCA that the appeals by the appellants be allowed and that the orders of the courts below be set aside. After studying the records of appeal, reading the written submissions by learned counsel for both sides and hearing their oral submissions, I come to the conclusion that the plaintiffs have not established their claims to the disputed land on the balance of probabilities, for reasons which I will advert to later.

[20] What is even more patent is that at the last paragraph of his judgment, the learned judge said:

> [59] Thus, on the facts of the case, the appeals ought to be allowed and that the orders of the courts below should be set aside. In the result I do not find it necessary to answer the questions posed in this court. As to costs, each party to bear their own costs.

[21] The applicants also argued that only two of the remaining judges, namely Raus Sharif PCA and Ahmad Maarop FCJ decided on the fundamental aspect of the appeals, namely, whether the custom of 'pemakai menoa' and 'pulau' comes within the definition of 'law' in art 160(2) of the Federal Constitution and therefore 'having the force of law' and answered the three questions of law posed for determination by this court. It was argued that this effectively resulted in a minority determination, which caused the applicants to lose their three appeals and this in itself is an injustice under r 137 of the RFC. We do not agree with this line of argument. In the first place, even though at the time of delivery of judgment, Abdull Hamid Embong FCJ had retired, there is no dispute that the judgment of the Federal Court was delivered pursuant to s 78(1) of the CJA by the remaining four judges on the panel. Therefore, at the time when judgment of the Federal Court was pronounced, the Federal Court was properly constituted and the judgments delivered cannot constitute a nullity. Furthermore, we agree with the submissions of Dato' Sri JC Fong, state legal counsel for the respondents to the effect that the three appeals were decided pursuant to s 77 of the CJA, by a majority opinion of three judges on the panel who agreed that the three appeals be allowed and the orders of the Court of Appeal and the High Court be set aside. Although one of the three judges forming the majority declined to answer the three questions of law, it cannot be denied that for varying reasons the majority decided that the three appeals be allowed and the orders of the courts below be set aside. What is more, all this is accurately reflected in the sealed order of the court dated 20 December 2016, which are in these terms:

> *ORDER*
>
> *... IT IS HEREBY ORDERED* (by majority Md Raus Bin Sharif PCA, Ahmad Bin Haji Maarop FCJ and Abu Samah Bin Nordin FCJ concurring and Zainun Binti Ali FCJ dissenting and Abdull Hamid Embong FCJ having retired) that this Appeal is hereby be allowed *AND IT IS FURTHER ORDERED* that the orders of the courts below are hereby be set aside *AND IT IS LASTLY ORDERED* that each party shall bear and pay their own costs of this Appeal, and deposits, if any, to be refunded.
>
> *GIVEN* under my hand and the Seal of the Court on 20th day of December 2016.
>
> *DEPUTY REGISTRAR*
>
> *FEDERAL COURT OF MALAYSIA*
>
> *PUTRAJAYA*

[22] What stands out is that as a matter of substance the sealed order itself emphatically spelled out the outcome of the three appeals: three of the remaining four judges on the panel had decided that the appeals be allowed and only one of the judges dismissed the appeals. No confusion arises over the terms of the sealed order. In this connection, an important point to note is that in the case of *Jeli ak Naga & Ors (suing on behalf of themselves and on behalf of all the residents of the longhouse known as Rumah Jeli ak Naga, Rumah Rajit ak Ambas, Rumah Jambai ak Jali, Rumah Edward Ekau ak Simbeng and Rumah Duat ak Kalom and/or all other proprietors, occupiers, holders or claimants of native customary right lands situated at or around Sungai Sibuti, Sungai Bakas and Sungai Kelitang, Sibuti, Sarawak) v Tung Huat Pelita Niah Plantation Sdn Bhd & Ors and another appeal* [2018] 12 MLJ 134; [2018] 1 LNS 1464, it was among others argued that the Federal Court in the three appeals did not come to a decisive conclusion on the issue of NCR claims by way of 'pemakai menoa' and 'pulau galau'. It was highlighted that Raus Sharif PCA and Ahmad Maarop FCJ had decided that the custom of 'pemakai menoa' and 'pulau' did not come within the definition of 'law' in art 160(2) of the Federal Constitution and therefore these customs were not 'having the force of law' in Sarawak. It was pointed out that Zainun Ali FCJ dissented. It was further argued that Abu Samah Nordin FCJ had in fact agreed with the dissenting judgment on the law and had only allowed the appeal on finding of facts. Whilst Abdull Hamid Embong FCJ, the appellants added, had since retired. Based on all this, it was thus submitted that the Federal Court were equally divided 2–2 on its decision on the fundamental aspect of the appeal whether the custom of 'pemakai menoa' and 'pulau' falls within the definition of 'law' in art 160(2) of the Federal Constitution and therefore 'having the force of law' in Sarawak. The Court of Appeal in *Jeli ak Naga & Ors v Tung Huat Pelita Niah Plantation Sdn Bhd & Ors and another appeal* rejected this line of contention. Tengku Maimun Tuan Mat JCA (later CJ) in delivering the judgment of the Court of Appeal, with the necessary emphasis, held:

> [52] By the doctrine of stare decisis, it was the majority decision that we should follow (see *Barat Estates Sdn Bhd v Parawakan a/l Subramaniam* [2000] 4 MLJ 107; *Fawziah Holdings Sdn Bhd v Metramac Corp Sdn Bhd* [2006] 1 MLJ 435) and *it was our position that the decision of TR Sandah was a majority decision*. We were thus not convinced that we should depart from the majority judgment of the Federal Court in *TR Sandah*.

[23] Therefore, it is unmistakable that the Federal Court decided the three appeals with a 3–1 majority. The appeals were determined in accordance with the opinion of the majority of the judges composing the court as provided for by s 77 of the CJA. It undoubtedly was not a 2–2 decision. In our judgment, in the circumstances, the decision of the majority is not a nullity, and no injustice was caused to the applicants. The fact that the decision of the Federal Court is by a majority of the judges who heard the three appeals is not a ground for a

review of that majority decision by another panel under r 137 of the RFC. In this regard, we refer to the judgment of Lord Wilberforce in *Fitzleet Estates Ltd v Cherry (Inspector of Taxes)* [1977] 1 WLR 1345 at p 1349 where His Lordship held:

> Nothing could be more undesirable, in fact, than to permit litigants, after a decision has been given by this House with all appearance of finality, to return to this House in the hope that a differently constituted committee might be persuaded to take the view which its predecessors rejected. True that the earlier decision was by majority: I say nothing as to its correctness or as to the validity of the reasoning by which it was supported. That there were two imminently possible views is shown by the support for each by at any rate two members of the House. But doubtful issues have to be resolved and the law knows no better way of resolving them than by the considered majority opinion of the ultimate tribunal. It requires much more than doubts as to the correctness of such opinion to justify departing from it.

[24] As to the point raised by the appellants that the learned judge erred in 'disturbing the findings of facts' and had fallen into grave error when he expressly declined to answer the questions of law posed, and allowing the appeal, it is not for this court to consider whether the learned judge had or had not made a correct decision on the facts or law because, as we have indicated earlier, that is a matter of opinion. A review is distinct from and should not be confused with an appeal. In conducting a review, the court is primarily concerned not with the correctness of the decision under review. The emphasis on finality of litigation could not be overstated. Under no circumstances in a review application should this court position itself as if it were hearing an appeal and decide the case as such.

[25] Finally, we now turn to consider the ground that the composition of the Federal Court that heard the three appeals did not have a judge with Bornean judicial experience and thereby contravening para 26(4) of the Inter-Governmental Committee Report (IGC) 1962 read with article VIII of Malaysia Agreement 1963. Mr George Lim, counsel for the respondent, Rosebay Enterprise Sdn Bhd, submitted that 'this is an afterthought and a desperate attempt to craft this application to fall within the exceptional circumstances'. There is merit in this line of argument. As pointed out by Mr George Lim, when the three appeals were argued before the Federal Court, there was no issue raised that the panel then was incompetent for lack of quorum or that the applicants took objection to the composition of the panel; no issue was raised then that not a single one of the said five member panel had the 'Borneo judicial experience'.

[26] More importantly, the position in law on this matter is now well settled. This issue was raised very recently before the Federal Court in an earlier r 137 review application. As submitted by the state legal counsel, the Federal Court

in *Keruntum Sdn Bhd v The Director of Forests & Ors* [2017] MLJU 2437; [2018] 4 CLJ 145 held, inter alia, that a litigant cannot enforce the recommendation under para 26(4) of IGC Report that, normally the Federal Court hearing an appeal from a case originating from the Borneo States should comprise of at least one judge with Bornean judicial experience, because this recommendation has never been implemented by legislative, executive or other action by the Governments of the Federation of Malaya, Sabah or Sarawak and also, not incorporated into the Constitution of Malaysia. It was submitted by the state legal counsel that 'there is no basis or cogent reason for this Coram of the Federal Court to deviate from its decision in the *Keruntum Sdn Bhd* case'. In this regard, I think it is important that we repeat here in extenso, with the necessary emphasis, what Zulkefli Ahmad Makinudin PCA said in delivering the judgment of the court:

> [16] It is to be noted that it is art 122 of the Federal Constitution which provides for the constitution of the Federal Court. This article does not expressly provide that amongst the judges of the Federal Court, there must be one with Bornean judicial experience. A reference was made to the provision of s 19 of the Malaysia Act 1963 and art 123 of the Federal Constitution on the qualification for appointment of a judge of the Federal Court. Neither of these two provisions stipulates that the qualification for appointment of a judge of the Federal Court having Bornean judicial experience is either required or preferred.
>
> [17] *The composition of the Federal Court at any given time is determined by the Chief Justice. It is also to be noted that subsequent to the IGC report, and the coming into force of the Courts of Judicature Act 1964 throughout Malaysia with effect from 16 March 1964, s 74 remained unamended. It is our considered view reading s 74 of the CJA together with art 122 of the Federal Constitution, clearly does not impose a legal requirement that the Federal Court, when hearing or disposing of cases, must consist of at least one judge with Bornean judicial experience*.
>
> [18] On the applicability of para 24 of the IGC report relied on by the applicant and the use of the word 'normally' in the said report, we are of the view that it did not intend to impose any mandatory requirement regarding both the composition of the court or where it sits when hearing a case arising from a Borneo State. With respect, we do not agree with the contention of the applicant that because the present case is a normal case, therefore the convention ought to have been observed having regard to the Federal structure of our Federal Constitution.
>
> [19] It is to be noted that the recommendation in para 26(4) of the IGC report was never implemented under article VIII of the Malaysia Agreement 1963 which provides as follows:
>
> The Governments of the Federation of Malaya, North Borneo and Sarawak will take such legislative, executive or other action as may be required to implement the assurances, undertakings and recommendations contained in Chapter 3 of, and Annexes A and B to the Report of the Inter-Governmental Committee signed on 27 February 1963, in so far as they are not implemented by express provisions of the constitution of Malaysia.

[20] *The said recommendation in para 26(4) was never implemented by an express provision in the Federal Constitution nor by any legislative, executive or other action by the Government of the Federation of Malaya, North Borneo (Sabah) and Sarawak*. We are in agreement with the submission of learned counsel for the respondent that Article VIII of the Malaysia Agreement did not mandate the Judiciary to take action to implement the said recommendation and the recommendation in para 26(4) of the IGC report cannot be enforced by the courts whether by a decision made in this application or by way of rules made pursuant to ss 16 and 17 of the CJA.

[21] It is our judgment that since the said recommendation of the IGC report has not and was never implemented under article VIII of the Malaysia Agreement, the applicant cannot therefore claim any legal right to have a 'judge with Bornean experience' in the appeal panel when its appeal was heard and decided by the Federal Court.

[27] The judgment of the Federal Court in *Keruntum Sdn Bhd* case represents the law on the subject matter as we apply today. There's no other case that's clearer than this on this point. We are in complete agreement with the above view; we are of the opinion that the decision is correct and should be followed. There is no valid reason for us to depart from our own decision in the *Keruntum Sdn Bhd* case. Therefore, this attempt by the applicants to question the composition or quorum of the panel of judges hearing the three appeals is without any merit and must inevitably fail.

[28] In the upshot, we find that there is no basis for a new panel of the Federal Court to review the earlier decision of the Court made by a majority of the judges thereof. In reality, as aptly described by the state legal counsel, these review applications have all the hallmarks of litigants seeking to appeal against the majority judgment, and for another panel of the Federal Court to uphold the minority judgment and overrule the majority decision. To allow these applications for 'review' of the earlier decision of this court, might result in chaos to the system of judicial hierarchy and would undermine the important principle of finality of judgments delivered by the Federal Court as the highest court of the country as well as the established principle that there should be finality in litigation. In *Amalan Tepat Sdn Bhd v Panflex Sdn Bhd* [2012] 2 MLJ 168; [2012] 2 CLJ 687, the Federal Court held as follows:

[35] In *Badan Peguam Negara v Kerajaan Malaysia* [2009] 2 MLJ 161; [2009] 1 CLJ 833, Zaki Azmi CJ (as he then was), in relation to finality of judgments delivered by this court, said (at p 175):

[27] And in the context of this case, even if we disagree with the earlier panel on the interpretation of the relevant articles of the Federal Constitution, that does not warrant us to set aside the judgment for otherwise there is no end of the proceedings.

The aforesaid view would be in line with what was said by Lord Watson in *Venkata Narasimha Appa Row v The Court of Wards & Ors* [1886] 11 AC 660. At p 664, Lord

Watson in delivering the judgment of the House of Lords said:

> There is a salutary maxim which ought to be observed by all Courts of last resort — Interest republicae ut sit finis litium. Its strict observance may occasionally entail hardship upon individual litigants, but the mischief arising from that source must be small in comparison with the great mischief which would necessarily result from doubt being thrown upon the finality of the decisions of such a tribunal as this.

[29] In our judgment, the present review applications are in actual fact attempts to relitigate the substantive merits of the three appeals and reopen and re-examine a final decision that had already been conclusively given by this court on 20 December 2016. It seems to us that the applicants were attempting to have the proverbial second bite of the cherry in filing the review applications herein.

[30] On the face of the record, it was not shown there was injustice. For all the above reasons, we accordingly dismiss the review applications.

David Wong CJ (Sabah and Sarawak) (delivering dissenting judgment of the court):

INTRODUCTION

[31] Before us are three review applications filed pursuant to r 137 of the Rules of the Federal Court 1995 and they are as follows:

(a) 01–27–04 of 2015(Q) ('Review 27/2015');

(b) 08(RS)-3–03 of 2019(Q) ('Review 3/2019'); and

(c) 08(RS)-4–03 of 2019(Q) ('Review 4/2019').

[32] The review applications are in respect of this court's decision dated 20 December 2016 where the appeals were allowed in that the applicants' claim for native customary rights pursuant to the native custom of 'pemakai menoa' and 'pulau galau' were dismissed.

[33] The three grounds of the applications before us constitute two allegations of coram failure and another separate ground:

(a) that the supporting judgment of Justice Abu Samah Nordin was in fact a judgment sustaining the claims of the applicants which would effectively render the decision of the Federal Court panel evenly divided (2–2) and hence in breach of s 78(1) of the Courts of Judicature Act 1964;

(b) that the composition or quorum of the panel of judges that heard this appeal was in contravention of para 26(4), Chapter 3 of the Report of the Inter-Governmental Committee (IGC) 1962 read together with article VIII of the Malaysia Agreement 1963 that there must be at least one judge with Bornean judicial experience to hear any appeal arising from the Borneo states and thus causing an injustice to the applicants who are the indigenous peoples of Sarawak — a Borneo state; and

(c) and the final ground not relating to coram failure is that the majority judgment had expounded an opinion which is wrong in law.

[34] We heard these review applications on 15 July 2019 and deferred our decision on the same to 11 September 2019. On that date, I delivered my truncated grounds and indicated that I will follow up with my full grounds. These are therefore my full grounds.

BACKGROUND FACTS

[35] In view of the unique nature of the applications before us, I find it appropriate to spend some time setting out in some detail what had transpired at both the High Court and Court of Appeal. I say it is appropriate as knowledge of what was decided at the High Court and Court of Appeal is crucial to put these review applications into perspective.

At the High Court

[36] Review 27/2015 was originally a matter before the High Court of Sabah and Sarawak at Kuching. The applicants here were there the plaintiffs. They sought a declaration that they enjoyed native customary and usufructuary rights over certain lands in the State of Sarawak on the basis that they had established the native customs of *pulau galau* and *pemakai menoa*. Yew Jen Kie J (as she then was) allowed their claim.

[37] Dissatisfied, the respondents (defendants at first instance) appealed to the Court of Appeal. However, the Court of Appeal consisting of Hishamudin Yunus, Abdul Wahab Patail and Balia Yusof JJCA unanimously upheld the decision of the High Court and accordingly dismissed the appeal.

[38] We also have review applications 3/2019 and 4/2019 which jointly constituted another action before the same High Court judge. All applicants were also originally plaintiffs. They, like in Review 27/2015, sought to argue that they possessed native customary and usufructuary rights over certain lands in the State of Sarawak. On this basis, they argued that the lease granted by the relevant state authorities (respondents in Review 3/2019) to Rosebay Sdn Bhd

(the respondent in Review 4/2019), was in breach of the said native customary rights. The learned High Court judge, Yew Jen Kie J (as she then was) allowed the claim.

[39] The relevant state authorities and Rosebay respectively took the matter up before the Court of Appeal. A panel consisting of Abdul Wahab Patail, Clement Skinner and Hamid Sultan Abu Backer JJCA unanimously upheld the decision of the High Court and accordingly dismissed their respective appeals.

[40] In the High Court, Justice Yew Jen Kie in both matters before her dealt with the substantive issue of whether the native customs of *pulau galau* and *pemakai menoa* are part of Sarawak law. This was how she put it in the matter relating to Review 27/2015:

> 49. Does the fact that the term 'Pemakai Menua' is not mentioned in Adat lban 1993 mean that such practice does not exist? In *Nor Nyawai*'s, in response to the defence argument that non-mention of the term 'pilau' [sic] in Adat lban 1993 nor in Tusan Tunggu meant that this practice was not in accordance with the customary law, the learned judge said:
>
> > For that argument to succeed it must be shown that there are provisions in the Adat lban to say that unless a custom is mentioned in it, such a custom is no longer to be recognised or regarded as a native customary right. There is no such provision because it was not so intended. This is clear from the words in s 7(1) that where the Adat lban states that where a particular custom is stated it is deemed to be correct. As was said earlier, there must be clear unambiguous words to that effect if it was intended that the native customary rights that had existed since before the time of the First Rajah and that had survived through all the orders and legislation were to be extinguished. Not only that there are no such words, neither was there any words that can possibly give rise to such inference.
>
> 50. I adopt the above view. Hence, the fact that the term 'Pemakai Menua' is not mentioned in Adat lban 1993 does not mean such practice did not exist.
>
> 51. In the light of the law referred to above, I hold the view that the lban Custom and practice of 'antara' or 'garis menua' or the 'Pemakai Menua', 'temuda' and 'Pulau' is native customary law having recognising [sic] of law within the meaning of s 160(a) of the Federal Constitution.

[41] Justice Yew Jen Kie adopted the same reasoning in the matters relating to Review 3/2019 and 4/2019.

[42] In both cases, Justice Yew Jen Kie also found, on the evidence, that the applicants had on a balance of probabilities proved that they had practised the native customs of *pulau galau* and *pemakai menoa*. In Review 27/2015 this is what the learned High Court judge said:

A careful perusal of the above oral evidence and the documentary evidence revealed the following:

(a) The unchallenged testimony of PW1 regarding the history of the Plaintiffs' forefathers creating, acquiring the native customary rights over the claimed area by occupation thereof the claimed area is clearly evidenced by the presence of old longhouse sites or 'tembawai' ie Rumah Sandah, Rumah Lajang and Rumah Manila in the valley of Sungei Machan as shown in the map marked 'M'.

(b) PW1's testimony of the cultivation on the claimed area since his forefathers until now is consistent with the aerial photographs taken in 1951 marked Appendix A annexed to-DW4's report incorporated as Flat C of exhibit 2SDBD. The total acreage of the claimed area was 5639 hectares comprising approximately 2712 hectare of primary forest and approximately 2802 hectare of cleared area.

(c) PW1 testimttny of cultivation on the claimed area is further corroborated by the map of PEG at pages 2–3 exhibit 2DSBD, which shows the activities of shifting activities [sic].

(d) The three Identity cards of Rubber Holding reveal that occupation and cultivation had taken place on the claimed area as early as 1938.

[43] In Reviews 3/2019 and 4/2019, the same learned judge found that applicant's, Siew Anak Libau's, evidence was credible:

In my judgment, the fourth plaintiff has shown that he and the residents of Rh Siew have been in occupation within the area claimed by the first plaintiff since their ancestor Berinau ak Bangan first cleared the virgin jungle in 1800s and occupied it until this day. The unchallenged evidence that when the fourth plaintiff discovered in early 1995 that the first defendant had trespassed into the land claimed by the first plaintiff and protected to the first defendant asking them to stop and was subsequently paid 'Pelasi Menua' of RM700 and 'sagu hati' of RM300 for each door of the longhouse, amply shows that the fourth plaintiff and the residents of Rh Siew possess sufficient power to protect their native customary land from interfering [sic] by the first defendant, in my judgment, that proves continuous occupation by the fourth plaintiff.

The Court of Appeal

[44] The Court of Appeal in Review 27/2015 affirmed the findings of the learned judge. Justice Abdul Wahab Patail put it this way:

[32] Since the area of 2, 712 hectares (the subject of this appeal) that is claimed as pulau adjoins the area where it is conceded that they have native customary rights to, from occupation by their ancestors in the 1800s, it is safe to conclude that the pulau area was likewise established in the 1800s by their ancestors ...

[46] As we have concluded earlier above, there is no reason to hold that the claim over the area of 2, 712 hectares, as 'pulau' is not bona fide. It was conceded that the

respondents had valid native customary right to the 2,802 hectare area adjoining it. It was acknowledged that although the Adat Iban Order 1993 did not mention the native custom of 'pemakai menoa', it did-not mean the native custom did not exist.

[45] In respect of Reviews 3/2019 and 4/2019, the Court of Appeal also affirmed the findings offact by the learned trial judge and this is what they said:

The Bona Fides of The Claim To The NCR Right to the Land

Status As Iban And Natives Of Sarawak

[17] The respondent and the persons he represented had asserted in the statement of claim that they were Ibans and were natives of Sarawak.

[18] From the statements of defence, some limited facts were admitted by the appellants while other assertions were denied, the plaintiffs put to strict proof. To this assertion that they are Ibans and natives of Sarawak, it was pleaded in the defence that the appellants had no knowledge and put the plaintiffs to strict proof.

[19] It is trite that denials and putting the plaintiff to strict proof does not change the standard of proof required in civil cases, which remains as upon a balance of probabilities and is upon the party who relies on that fact to succeed (ss 101, 102 & 103 Evidence Act 1950). An assertion that is inherently improbable contributes nothing to the balance. But any evidence that is admitted into evidence, however little it may be, adds to the balance, and if there is no evidence adduced to contradict and outweigh it, it is accepted that he has discharged the burden of proof that is upon him. The key word in the phrase 'balance of probabilities' is not the word 'probabilities', but the word 'balance'. This explains the principle of the shifting of the balance, that once a plaintiff has adduced some evidence that is not incredible, the burden shifts to the other party to adduce evidence to contradict it. He needs to adduce only sufficient evidence to outweigh the evidence adduced by the plaintiff. But if he fails to do so, then the balance of probabilities is in favour of the plaintiff.

[20] It is fact that Ibans are a race native to Sarawak. The question was whether the respondent and the residents of Rumah Siew were Ibans. Examination of the testimony of the respondent who came forward to testify as PW2 shows no challenge as to whether he and the residents of Rumah Siew were Ibans or not. Thus, although the respondent was put to strict proof, he had come forward and the challenge was abandoned. Obviously, if he came forward and looked like no Iban looks-like, or he looked like an Eskimo, he would have been challenged on whether he was Iban. Therefore, it is fair to infer and conclude that since he came forward, held a Malaysian identity card, and was not challenged, his assertion he and the residents he represents are Iban and natives of Sarawak is accepted.

[21] The point is that once shown that they are Ibans and natives of Sarawak, their claim to native customary rights is not inherently incredible.

[22] In our view, there is more than sufficient evidence to establish the bona fides of the respondent and the residents of Rumah Siew to maintain an NCR claim as Ibans and natives of Sarawak. Whether they succeed in their NCR claim to land is a separate matter.

[46] As to the issue whether the native customs of *pulau galau* and *pemakai*

menoa are recognised by the law of Sarawak, in respect of both cases, Justice Abdul Wahab Patail answered in the affirmative on the following reasons:

A

[43] We return to the submission that the laws of Sarawak does not recognise 'pulau' as a valid native customary right to land.

B

[44] The Legislative and administrative orders referred to above may be summarised broadly as follows. The Rajahs Order of 1875 is to the effect that if in the future large clearing is made of old jungle and afterwards abandoned, anyone else may make use of such abandoned land as squatters. The Fruit Trees Order 1899 is to the effect that a person may claim and sell fruits and rattan only if he had planted and cultivated the same. The Land Order 1920 authorises natives to occupy land free of all charges for the cultivation of fruit trees, padi, vegetables, pineapples, sugar cane, bananas, yams and similar cultures in accordance with the customary laws, and where possible the claim shall be registered with native headmen and land office in the district. The Supplementary to Land Order 1920 envisaged the setting aside of native land reserves in which natives can be allocated each one lot of three acres. The Guidance of Officers in Interpreting Order No L-4, 1928 sets out tests for recognising existence of custom that it must be geaeral and iaveterate, and is not unreasonable, not against morality and not against public policy. The Land Settlement Ordinance (Rajah Order L-7 of 1933) defined native customary rights to be land planted with more than 20 fruit trees per acre, land in continuous occupation or has been cultivated or built on wimin-three years, burial grounds or shrines and rights of way. The Secretariat Circular of 1933 recognised right to clear land which then vests in the community and kept in cultivation in a cycle compatible with the maximum fertility of the land cultivated in expert native opinion, by methods within the reach of the community. The Secretarial Circular of 1939 enlarges upon the 1933 circular, recognised where not inconsistent with community ownership, individual ownership which may, subject to a say in the matter by the community, be transferred to others outside the community. The Tusun Tunggu disallowed selling, purchase or lease of native customary land, but allowed gift or inheritance, and if a native moves out he loses his right to the farmed land which reverts to crown land. The Sarawak Land Code 1958 then introduced provision by which native customary rights may be created, and that until title is issued it is deemed to be held under licence free of rent, and the question whether such right has been created or lost or terminated shall be determined by the law in force immediately prior to the 1 January 1958.

C

D

E

F

G

H

[45] More precisely, these laws set out what natives may claim under those laws. lf there is nothing in the law that recognises the native customary rights to land, it is equally true there is nothing in clear and unambiguous language rejecting native customary rights to land. We found no assistance to the question in the particular facts before the court, in this appeal, that is the status of native customary rights acquired before the arrival of the Brookes who held sovereignty between 1841 and 1946, British rule and the State of Sarawak in Malaysia.

I

[46] As we have concluded earlier above, there is no reason to hold that the claim over the area of 2,712 hectares, as 'pulau', is not bona fide. It was conceded that the respondents had valid naiive customary right to the 2,802 hectare area adjoining it.

It was acknowledged that although the Adat lban Order 1993 did not mention the native custom of 'pemakai menoa' it did not mean the native custom did not exist.

[47] Unlike law imposed from above by coercive authority such as a king or a legislature, native customary law develops from the ground as customs and practices evolve from and in response to changing circumstances and gain general acceptance. In a sense it is direct democracy. These native customary laws traversed a broad range of subjects of communal interest, as the later Adat lban Order 1993 itself demonstrates. Not all but some of which relate to interest in land.

[48] Although in the Federal Constitution, 'State law' means:

(a) any existing law relating to a matter with respect to which the Legislature of a State has power to make law, being a law continued in operation under Part XIII; and

(b) a law made by the Legislature of a State; the definition of law under the Federal Constitution, that it 'includes written law, the common law in so far as it is in operation in the Federation or aay part thereof, and any custom or usage having the force of law in the Federation or any part thereor'; means that the common law nevertheless applies in the State of Sarawak.

[49] The respondents, as natives of Sarawak are no less Malaysian citizens, therefore entitled to the protections of their rights under the Federal Constitution as anyone else. The Court of Appeal in *Superintendent of Lands & Surveys & Ors v Nor Anak Nyawai & Ors* endorsed the existence of native customary rights under common law:

> In respect of the other expositions of the law by the learned Judge in relation to native customary rights we are inclined to endorse them. And briefly they are as follows:
>
> (a) that the common law respects the pre-existence of rights under native laws or customs though such rights may be taken away by clear and unambiguous words in a legislation;
>
> (b) that native customary rights do not owe their existence to statutes. They exist long before any legislation and the legislation is only relevant to determine how much of those native customary rights have been extinguished;
>
> (c) that the Sarawak Land Code 'does not abrogate whatever native customary rights that exist before the passing of that legislation'. However natives are no longer able to claim new territory without a permit under s 10 of that legislation from the Superintendent of Lands & Surveys; and
>
> (d) that although the natives may not hold any title to the land and may be termed licensees, such licence cannot be terminable at will. Theirs are native customary rights which can only be extinguished in accordance with the laws and this is after payment of compensation.

[50] That view was accepted by the Federal Court in *Superintendent of Land &*

Surveys Miri Division & Anor v Madeli bin Salleh (suing as Administrator of the Estate of the deceased, Salleh bin Kilong) [2008] 2 MLJ 677; [2007] 6 CLJ 509, where Ariffin Zakaria FCJ (as he then was) held:

> The CA in *Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal* [2006] 1 MLJ 256; [2005] 3 CLJ 555 endorsed the view of the learned judge in relation to native customary rights in that the common law respects the preexistence [sic] of rights under native laws and customs though such rights may be taken away by clear and unambiguous words in a legislation. By common law the Court of Appeal must be referring to the English Common Law as applicable to Sarawak by virtue of s 3(1)(c), Civil Law Act 1956.

[51] The common law recognition of pre-existing native customary law provides the basis of successful claims in *Mabo and Others v Queensland (No 2)* [1992] 175 CLR 1 HCA; [1992] HCA 23 and *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 CA, 672 at p 673.

[52] We are of the view that recognition of the pre-existing native customary rights of the respondents' ancestors to the land in their 'pemakai menoa' is inherent, for although the Brookes assumed sovereignty in 1841, at no time were the natives conquered and their lands and properties confiscated in war. There is a clear distinction between assumption of sovereignty and title to land. The sovereign right to title within the state is not absolute but subject to unconfiscated pre-existing rights.

[53] Although the respondents in *Superintendent of Lands & Surveys & Ors v Nor Anak Nyawai & Ors* failed in their claim, it was for failure to adduce evidence in support of their claim of native customary rights. Tfie present appeal suffers no similar impairment.

[54] We conclude in the absence of clear and unambiguous words to repeal or reject pre-existing native customary rights established under pre-existing native custom, common law applicable in Sarawak recognises the native customary rights inherited by the respondents from their ancestors who established the rights in the early 1800s over the 2,712 hectare area set aside in their 'pemakai menoa' under the native custom of 'pulau' and that right cannot be taken away without compensation.

Federal Court

[47] The respondents then collectively took the matters up before the Federal Court and were granted leave to appeal on 11 March 2015. It was also ordered that the three appeals be heard jointly before the Federal Court as the questions of law arising therefrom were substantially the same.

[48] These were the questions

(a) whether the pre-existence of rights under native laws and customs which the common law respects include rights to land in the virgin/primary forests which the natives, like the respondents and their ancestors (who are lban by race), had not felled or cultivated but were forests which they have reserved for food and forest produce? ('Question 1')

(b) whether the High Court and the Court of Appeal are entitled to uphold a claim for native customary rights to land in Sarawak based on a native custom (namely) pemakai menoa and/or pulau where:

(i) there is proof that such custom was practised amongst the native communities (particularly amongst the lbans) for the creation of rights to land prior to the arrival of the First Rajah in 1841;

(ii) such a custom was never reflected or recognised as having been practised by the native communities in relation to the creation of rights to land, in any of the Orders made and legislations passed by or during the Brooke era or by the Legislature of Sarawak; and

(iii) such a custom was never part of or recognised in Tusun Tunggu and the Adat lban Order 1993, which declared, pursuant to the Native Customary Laws Ordinance, the customary laws of the lban community in Sarawak ('Question 2'); and

(c) whether the Court of Appeal's decision in *Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Drs and another appeal* [2006] 1 MLJ 256; [2005] 3 CLJ 555 that the rights of the natives is confined to the area where they settled and not where they foraged for food is a correct statement of the law relating to the extent and nature of rights to land claimed under native customary rights in Sarawak ('Question 3').

[49] The Federal Court appeal was initially heard by a panel of five judges, namely, Md Raus Sharif PCA (Justice Raus Sharif); Abdul Hamid Embong FCJ; Ahmad Maarop FCJ (Justice Ahmad Maarop); Zainun Ali FCJ (Justice Zainun Ali); and Abu Samah Nordin FCJ (Justice Abu Samah). However, on the date of delivery of the decision and grounds, Justice Abdul Hamid Embong FCJ had retired leaving a panel of four judges.

[50] Three grounds of judgment were delivered by the remaining panel of four. The then President of Court of Appeal, Justice Raus Sharif wrote a judgment allowing the appeal of the respondents with Justice Ahmad Maarop concurring. Justice Abu Samah however purported to write a supporting judgment to that of Justice Raus Sharif's. Justice Zainun Ali took a different view to that of Justice Raus Sharif and Justice Ahmad Maarop. The upshot was that the appeal by the respondents was allowed ostensibly by a majority of three to oneresulting in the setting aside of the judgments of both the High Court and Court of Appeal. For convenience, the Federal Court judgment dated 20 December 2016 shall be referred hereafter as the 2016 judgment.

MY OPINION

[51] I have had the opportunity to read the draft grounds of the learned Chief Judge of Malaya who holds a view contrary to mine. I am perturbed by the fact that I find myself constrained to differ from four of my colleagues

whose views I always respect greatly. In view of that, I have given extra due consideration as to what ought to be the outcome of these review applications and having done so, it is in good conscience and with great sincerity that I can do no other but to maintain my dissent-the reasons for which I now set out.

Ground (i) — Section 78 of the Court of Judicature Act ('the CJA')

[52] To recapitulate, learned counsel for the applicants submitted that there was in fact no majority judgment in the 2016 judgment as Justice Abu Samah had in fact agreed with Justice Zainun Ali in respect of the answer to question 1. Hence if the aforesaid submission is sustained, then there has been a breach of s 78 of the CJA.

[53] The starting point in my deliberation is s 78 of the CJA which reads as follows:

> (1) If, in the course of any proceeding, or, in the case of a reserved judgment, at any time before delivery of the judgment, any Judge of the Court hearing the proceeding is unable, through illness or any other cause, to attend the proceeding or otherwise exercise his functions as a Judge of that Court, the hearing of the proceeding shall continue before, and judgment or reserved judgment, as the case may be, shall be given by, the remaining Judges of the Court, not being less than two, and the Court shall, for the purposes of the proceeding, be deemed to be duly constituted notwithstanding the absence or inability to act of the Judge as aforesaid.
>
> (2) In any such case as is mentioned in subsection (1) the proceeding shall be determined in accordance with the opinion of the majority of the remaining Judges of the Court, and, if there is no majority the proceeding shall be re-heard.

[54] The aforesaid provision is crystal clear and that is when a judge as in this case has retired, the remaining judges of four are entitled to continue with the court proceeding and to deliver its decision provided that that decision is a majority decision. If no majority decision is apparent, then the entire appeal will have to be reheard.

[55] The contention of the applicants here is that the central issue of the appeal was whether the laws of Sarawak recognise the native customs of *pulau galau* and *pemakai menoa* and from their reading of the three judgments, it is submitted that there was in fact no majority views as Justice Abu Samah's view on the aforesaid central issue was similar to that of Justice Zainun Ali while Justice Raus Sharif and Justice Ahmad Maarop shared a contrary view. We thus have a deadlock, so to speak. Hence, it is now incumbent on me to analyse the respective judgments to determine whether the applicants' contention is factually correct.

A Justice Raus Sharif

[56] I start off with the judgment of Justice Raus Sharif of which the rationale for can be gleaned from the following paragraphs of his grounds:

B [64] ... In art 160(2) of the Federal Constitution, 'law' is defined as follows:

> Law includes written law, the common law in so far it is in operation in the Federation or any part thereof, and any custom or usage having the force of law.

[65] The words 'having the force of law' in art 160(2) of the Federal Constitution
C are highly important as these words qualify the types of customs and usages which could come under the definition of law. These important words 'having the force of law' must be taken to mean not all customs or usages come within the definition and implies that there are customs and usages which do not have the force of law and hence not within the definition of law.

D [66] In the present appeals, the courts below should take into account the definition of customary laws under Sarawak State Laws which has been defined to mean 'customs which the laws of Sarawak recognise'. This must be taken to mean existing customs which have the force of law. Put simply, there are customs which the laws of Sarawak does not recognise and hence do not form part of the customary laws of
E the natives of Sarawak and remain merely as practices or usages of the native. They are not integral to the particular community in question and remain incidental. As such they do not come within the definition of law under art 160(2) of the Federal Constitution.

F [67] We must not lose sight of an Important fact that recognition alone that such custom or practice exist is not enough. Clearly, recognition of the existence of such practice had brought with it regulation and restriction. Our position is consistent with the principle as propounded in the case of *Nor Anak Nyawai* wherein it was held that the native customary rights claim over land founded upon the concept of continuous occupation does not extend to the areas of forests where the natives or
G their ancestors had entered into in search of food, jungle produce etc. What is essential as recognised by our courts is the custom of 'temuda' which is cultivation of land for occupation. This custom is essential and integral to the Iban culture which would include the custom of clearing, occupying and cultivating an area and included burial grounds and longhouse sites.

H [68] As stated earlier, what the laws of Sarawak had recognised is the custom or adat of 'temuda' which was subsequently incorporated into 'Tusun Tunggu'. What is stated in 'Tusun Tunggu' read as follows:

> Theoretically all untitled land whether jungle or cleared for padi farming (*Temuda*) is the property of the Crown. The fact that Dayaks do clear a portion
I of virgin land for the site of their padi farms confers on them restricted rights of proprietorship over the land thus cleared. Once the jungle has been cleared it becomes 'temuda'. It is a recognised custom that 'temuda' is for the use of the original worker, his heirs and descendants. This is the only way Dayaks can acquire land other than by gift or inheritance.

[69] The above declaration in 'Tusun Tunggu' has been confirmed by the Federal Court in *Bisi ak Jinggot @ Hilarion Bisi ak Jenggut v Superintendent of Lands and Surveys Kuching Division & Ors* [2013] 5 MLJ 149; [2013] 6 CLJ 805, where Suriyadi Halim Omar FCJ speaking for the court said:

> [37] From the totality of evidence and authorities referred in the course of the hearing, we are satisfied that the creation of native customary land and rights acquired by a native of Sarawak, is conditional upon the adherence to custom or common practice of his community. For an Iban, it has the customary concept of *Tusun Tunggu* whereby NCR could be acquired by two mode namely clearing untitled virgin jungle en route to the creation of what is locally described as temuda and the other by receiving the *temuda* as a gift or inheritance. For the first mode, the common thread is that the acquisition of NCR starts with the clearance of the said untitled virgin land or jungle by a native, followed by the occupation of the cleared land and thereafter not allowing the land to be abandoned. Once abandonment whatever NCR was created or acquired previously over the land would be lost. If the original owner abandons the land without more the community takes over.

[70] The decision of the Court of Appeal in *Nor Anak Nyawai* was strongly criticised by Mr Baru Bian describing it short of sound legal reasoning. With respect, we disagree. We are of the view that the decision of the Court of Appeal in *Nor Anak Nyawai* is the correct statement of law. It is not only consistent with decisions of our courts in *Adong* and *Sagong* but also with other Commonwealth countries that native customary law over land are founded upon the concept of native's custom of continuous occupation. For example, in Sagong, the proprietary interest of the orang asli in their customary and ancestral land was limited only to the area that forms their settlement but not to the jungle at large where they used to roam to forage for their livelihood in accordance with their custom and tradition. As stated in the preceding paragraphs, the position in *Nor Anak Nyawai* is consistent with the methods of creating customary rights under the Sarawak Land Code vides 5.

[71] The principle propounded in *Nor Anak Nyawai* and *Bisi Jinggut* is parallel to the position under the Sarawak Land Code. Section 5(1) of the Sarawak Land Code provides as follows:

> 5(1) As from the 1st day of January, 1958, native customary rights may be created in accordance with the native customary law of the community or communities concerned by any of the methods specified to subsection (2), if a permit is obtained under section 10, upon Interior Area Land. Save as aforesaid, but without prejudice to the provisions hereinafter contained in respect of Native Communal Reserves and rights of way, no recognition shall be given to any native customary rights over any land in Sarawak created after the 1st day of January, 1958, and if the land is State land any person in occupation thereof shall be deemed to be in unlawful occupation of State land and section 209 shall apply thereto.

[72] Under sub-s 2, the methods by which native customary rights may be created are:

> (2) The methods by which native customary rights may be acquired are:

A (a) the felling of virgin jungle and the occupation of the land thereby cleared;

(b) the planting of land with fruit trees;

(c) the occupation or cultivation of land;

B (d) the use of land for a burial ground or shrine;

(e) the use of land of any class for rights of way; or

(f) any other lawful method:

C Provided that:

(i) until a document of title has been issued in respect thereof, such land shall continue to be State land and any native lawfully in occupation thereof shall be deemed to hold by licence from the Government and shall not be required to pay any rent in respect thereof unless

D and until a document of title is issued to him; and

(ii) the question whether any such right has been acquired or has been lost or extinguished shall, save in so far as this Code makes contrary provision, be determined by the law in force immediately prior to the 1st day of January, 1958.

E

[73] Notwithstanding the methods prescribed above under sub-s 2, a permit can also be obtained from the Minister for the further creation of rights. Rights may also be available under the reserve system mandated by s 6 of the Sarawak Land Code.

F [74] Based on sub-s 2 of s 5 of the Sarawak Land Code, the underlying basis for the recognition of a particular native customary right to have the force of law is occupation of and its usage according to the customary practices of the community or communities concerned. In so far as occupation is concerned it was held in *Madeli Salleh* that occupation need not be actual occupation. As long as the natives have control over the land through supervision and continual visitation it suffices.

G [75] Thus, we agree with the views adopted by the Court of Appeal in *Nor Anak Nyawai*. We find nothing objectionable in the views expressed by the Court of Appeal in that case. On the contrary, we find that the Court of Appeal in the present appeals had erred in failing to consider that basis on the various orders of the Rajah that the rights to land could only be established by a native who had cleared the

H primary jungle for the purpose of farming or cultivation.

[76] Although common law recognises unregistered native customs, this is subject to the adherence of all tenets of customary land law. It is a well-established principle that having established that the custom of 'pemakai menoa' and 'pulau' exists, at the very least as a matter of fact, common law as developed in Malaysia further requires

I continues [sic] occupation and/or maintenance of the land in question.

[77] Based on what we have discussed above, the native customs of 'pemakai menoa' through the establishment of 'pulau' falls short of the prerequisites as provided for under s 5(2) of the Sarawak Land Code and thus, do not have the force of law as envisaged under art 160 of the Federal Constitution.

[57] In the circumstance, Justice Raus Sharif answered questions 1 and 2 in the negative and question 3 in the affirmative.

Zainun Ali FCJ

[58] Justice Zainun Ali in her dissenting judgment took a diametrically opposing view to that of Justice Raus Sharif's which approach is reflected in the following paragraphs of her grounds:

> Customary land rights of the natives are *sui generis*
>
> [165] In the present appeals, the existence of the customary practices of *pemakai menoa* and *pulau* is not disputed. The primary thrust of the appellants' appeals is that such customary practices do not have the force of law. Whilst it is true that 'not all customs have the force of law', it is critical for us to now discover what customs actually have the force of law.
>
> [166] Article 160(2) of the Federal Constitution reads:
>
> > 'Law' includes written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof;
>
> [167] The definition of law under art 160(2) of the Federal Constitution includes 'customs and usages having the force of law'. This makes customary law an integral part of the legal system in Malaysia.
>
> [168] Custom is a source of unwritten law. It must be emphasised that customary law is a traditional common law rule or practice that has become an intrinsic part of the accepted and expected conduct in a community. In *Mabo (No 2)* the High Court of Australia held that:
>
> > The term 'native title' conveniently describes the interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants.
>
> [169] As explained by Lord Denning in the case of *R v Secretary of State For Foreign and Commonwealth Affairs; Exparte Indian Association of Alberta* [1982] 2 All ER 118:
>
> > The Indian peoples of Canada have been there from the beginning of time. So they are called the 'aboriginal peoples.' In the distant past there were many different tribes scattered across the vast territories of Canada. Each tribe had its own tract of land, mountain, river or lake. They got their food by hunting and fishing: and their clothing by trapping for fur. So far as we know they did not till the land. They had their chiefs and headmen to regulate their simple society and to enforce their customs. I say 'to enforce their customs', because in early societies custom is the basis of law. Once a custom is established it gives rise to rights and obligations which the chiefs and headmen will enforce. These customary laws are not written down. They are handed down by tradition from

one generation to another. Yet beyond doubt they are well established and have the force of law within the community.

In England we still have laws which are derived from customs from time immemorial.

[170] Native customary rights to land are sui generis. The nature and kind of rights of the natives are embodied in their customary practices. As highlighted by the High Court of Australia in *Mabo (No 2)*:

> Native law has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs. (Emphasis added.)

[171] Thus, in the present appeals, I agree with the view expressed by Abdul Wahab JCA when he held that:

> Unlike law imposed from above by coercive authority such as a king or a Legislature, native customary law develops from the ground as customs and practices evolve from and in response to changing circumstances and gain general acceptance. In a sense it is direct democracy. These native customary laws traversed a broad range of subjects of communal interest, as the later Adat lban Order 1993 itself demonstrates. Not all but some of which relate to interest in land.

[172] A question then arises, how can a native customary practice attain the force of law? In *Tyson v Smith* (1837) 112 ER 1265 Tindal CJ held that:

> It is an acknowledged principle that, to give validity to a custom, which has been well described to be an usage, which obtains the force of law, and is, in truth, the binding law, within a particular district or at a particular place, of the persons and things which it concerns (see Davy's Reports, 31, 32), it must be certain, reasonable in itself, commencing from time immemorial, and continued without interruption. (Emphasis added.)

[173] In general, for a custom to be regarded as conferring legally enforceable rights, it is essential that such customs be immemorial, certain, reasonable and acceptable by the locality. It has to be consistent and continues to exist from time immemorial in a given community (see also *Halsbury's Laws of England* 4th Ed, (1975 — Vol 12).

[174] A custom must not be against humanity, morality and public policy. Therefore a custom upheld by the court must be reasonable. The court has a duty to examine whether or not a custom is reasonable having regard to the facts and circumstances of each case (*Nagammal v Suppiah* [1940] 1 MLJ 119; [1940] 1 LNS 60, *Tyson v Smith Mercer v Denne* [1905] 2 Ch 538 (Court of Appeal). As expressed by Tindal CJ in *Tyson v Smith*:

> The question, what customs are reasonable and what are not, is one upon which the books are not altogether silent. A custom is not unreasonable merely because it is contrary to a particular maxim or rule of the common law, for 'consuetudo ex ceriâ causâ rationabili usitata privat communem legem' (Co Litt 113 a), as the

> custom of gavelkind and borough English, which are directly contrary to the law of descent, or, again, the custom of Kent, which is contrary to the law of escheats. Nor is a custom unreasonable because it is prejudicial to the interests of a private man, if it be for the benefit of the commonwealth, as the custom to turn the plough upon the headland of another, in favour of husbandry, or to dry nets on the land of another, in favour of fishing and for the benefit of navigation.
>
> But, on the other hand, a custom that is contrary to the public good, or injurious or prejudicial to the many, and beneficial only to some particular person, is repugnant to the law of reason; for it could not have had a reasonable commencement ...

[59] Justice Zainun Ali thus answered question 1 in the affirmative and question 3 in the negative. As for question 2, Her Ladyship did not see it fit to answer.

Abu Samah FCJ

[60] On the central issue whether the Iban customs of *pulau galau* and *pemakai menoa* are recognised under Sarawak law, Justice Abu Samah's view can be gleaned from the following paragraphs:

> [296] In my view, the Sarawak Land Code does not abrogate or extinguish the pre-existing rights of the natives to their NCR which had existed prior to 1 January 1958. Nor does it imposes a total ban for the future creation of NCR. It merely restricts the creation of NCR in future by imposing certain conditions. This is clear from the wording of s 5 of the Land Code.
>
> ...
>
> [298] The phrase 'in accordance with the native customary law' in s 5(1) of the Sarawak Land Code is a clear restatement that the laws of Sarawak recognised the NCR of the natives that had existed prior to 1 January 1958.
>
> [299] This court in *Bisi Jinggot v Supt of Lands and Surveys Kuching Division & Ors*, at p 825 stressed that although the Sarawak Land Code brought major changes, it ensured the continued existence of native customary land, 'leaving the NCR unscathed'.
>
> [300] The plaintiffs' claim to the disputed land, based on the custom of *pulau* was in respect of land which they contended had been inherited from their ancestors in the 1800s, that is before the arrival of James Brooke. Any apprehension that allowing the claim to the land, where they reserved the virgin or primary forests for food and forest produce is as means of livelihood would open the floodgates for other potential claims would be quite remote, if not unfounded. The size of the area is a matter of evidence. In any event, such claim would not affect any NCR claim from 1 January 1958 onwards in view s 5(1) of the Sarawak Land Code. Again, any NCR created after 1 January 1958 may be extinguished, subject to payment of compensation as provided by s 5(3) of the Sarawak Land Code.
>
> [301] With respect to *Tusun Tunggu*, it was held by the learned judge in the case of

Nor Anak Nyawai that it was not a comprehensive codification of adat lban. The statement on *Tusun Tunggu* by Suriyadi Halim Omar FCJ as authority for the proposition that NCR could only be acquired by two modes: one by clearance of the untitled land or jungle by a native followed by uninterrupted occupation of the cleared land and the other, by way gift or inheritance appeared to be obiter. The issue in that case was not on the custom of Pulau. Richard Malanjum CJ (Sabah and Sarawak) seemed to hold a different view. At para 47 of his judgment in the same case he referred to the various terminologies under NCL which includes *pemakai menoa*, temuda and *pulau*. And at paras 63 and 67 of his judgment he held that 'the recognition of NCL should no longer be an issue'. NCL do not stand on the same footing as titled land alienated under the Sarawak Land Code. Recognition of NCL and the rights and interests arising therefrom are premised on common law principle.

[302] It was submitted by Datuk JC Foong for the appellants that the custom of *pemakai menoa* and *pulau* was not part of the common law which is recognised in Sarawak. It does not come within the definition of 'law' in art 160(2) of the Federal Constitution. The word 'law' in the Federal Constitution is defined as including 'written law, the common law insofar as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof. Ian Chin J in *Nor Anak Nyawai*'s case held that the common law as recognised in Sarawak came within the definition of 'law' in art 160(2) of the Federal Constitution and in my view, correctly.

[61] From my reading of the above, there is little doubt in my mind that Justice Abu Samah in answering the central issue emphatically concurred with Justice Zainun Ali's dissenting judgment that the lban customs of *pulau galau* and *pemakai menoa* are part of Sarawak law. This is evidenced in para 302 of his judgment where he rejected the submission of learned counsel for the respondents, Datuk JC Fong, that those customs were not part of the common law recognised in Sarawak because they did not meet the definition of 'law' in art 160(2) of the Federal Constitution. He had, in fact, accepted the view of the trial judge, Ian Chin J, in the case of *Nor Anak Nyawai* who opined that the common law as recognised in Sarawak came within the definition of 'law' in art 160(2) of the Federal Constitution.

ANALYSIS

[62] Hence it can be said that the submission of the applicants that there is no majority judgment is factually correct and the consequence of which is coram failure. However, Justice Abu Samah had allowed the appeal premised on the finding that the applicants at the trial had not proved their case as can be seen here:

[303] The issue whether the plaintiffs have required NCR under the native custom known as *pulau* is a matter of evidence. The plaintiffs could not make their claims solely on the mere assertion that the custom of *pulau* is part of their NCR without

offering evidence that they had exercised their right by using the area of the disputed land to forage for food or forest produce, fishing or hunting. The burden is on the plaintiffs to prove their case on the balance of probabilities ...

[311] It is obvious that PW2 himself was uncertain and unable to confirm whether the longhouse was on Lot 3 or Lot 13. On the totality of the evidence, I am of the view that there was no sufficient evidence to support the claim by the plaintiff, on the balance of probabilities. There was no proper judicial appreciation of evidence (*Asean Securities Paper Mills Sdn Bhd v CGU Insurance Bhd* [2007] 2 MLJ 301; [2007] 2 CLJ 1). Whilst an appellate court would be slow in interfering with the findings of the trial Judge and would only do so in the rarest of cases, it would do so, as in the circumstances of these cases, where there was manifest error in judicial appreciation of evidence.

[63] With respect, based on the aforementioned paragraph, it is undeniable that Justice Abu Samah at para 165 of his judgment had embarked on a fact-finding process and interfered with the findings of fact made by the High Court which were affirmed by the Court of Appeal. Premised on this contrary view, he allowed the applicants' appeal thus reversing the decisions of the Court of Appeal and High Court. However, the pertinent question is, which fact determined by the High Court was disturbed? Upon close scrutiny on the case I found that there are two sets of facts that are relevant to this case. One being *the existence of the custom of pemakai menoa and pulau* and second, *the existence of pemakai menoa and pulau in the disputed area.*

[64] What Justice Abu Samah did was to disturb the findings of fact made by the lower courts on the second fact; the existence of *pemakai menoa* and *pulau* in the disputed area, not the existence of the custom of *pemakai menoa* and *pulau* themselves. The undisputed fact is the existence of the custom of *pemakai menoa* and *pulau.*

[65] With respect, the issue of 'evidential proof' by the applicants was never an issue before the Federal Court. This is fortified by both Justice Raus Sharif and Justice Zainun Ali who noted that there was no discussion on this issue at all.

[66] Justice Raus Sharif in para 64 says this:

This is not a case where we are called upon to consider whether such a practice exists or otherwise. *Rather, what is pertinent here is whether the practice which exist has any force of law.*

[67] If I may say so, the balded words above speak for themselves.

[68] Justice Zainun Ali's judgment was also fashioned on the same premise and that can be found in para 165 which reads as follows:

A *In the present appeals, the existence of the customary practices of pemakai menoa and pulau is not disputed.* The primary thrust of the appellants' appeals is that such customary practices do not have the force of law. (Emphasis added.)

B **[69]** I am also fortified in my view on the manner the three leave questions were framed and in my view they do not call for any determination by the Federal Court as to whether the findings of fact by High Court and concurred to by Court of Appeal had been plainly wrong or the High Court's findings are such that no reasonable tribunal would arrive at. With respect, there has been a breach of s 96 of the CJA which reads as follows:

C

> Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court —
>
> D
>
> (a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction involving a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage; or
>
> E
>
> (b) from any decision as to the effect of any provision of the Constitution including the validity of any written law relating to any such provision.

[70] Section 96 of the CJA restrict the Federal Court to questions of law decided for the first time or which are of public importance. The Federal Court F may only interfere when there has been a miscarriage of justice from the judgment of the lower courts.

[71] I am aware that there is an exception to s 96 of the CJA where the Federal Court may *suo motu* pose additional questions so as to deal with any G matter which it considers relevant for the purpose of doing complete justice according to the substantial merits of a particular case. Parties too may generally themselves raise. additional issues beyond the scope of the questions of law upon which leave was granted where circumstances justify it. Precedent H for these propositions are the judgments of the Federal Court in *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal* [2005] 3 MLJ 97; and *Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia* [1999] 2 MLJ 337.

I **[72]** However, in the context of the present review applications, Justice Abu Samah had not shown where the manifest error in the judgment of the High Court was so as to justify an interference in the fact-finding process of the lower court. Nor, from my reading of the 2016 judgment was the factual existence

and practice of the customs ever in issue before the court. This, as pointed by the statements made in the other two judgments, is because such a point was indeed never an issue.

[73] How then should the judgment of Justice Abu Samah especially his interference in the fact-finding process of the lower court be treated in these review applications? It has been shown that Justice Abu Samah was on the same page, so to speak, with Justice Zainun Ali on the central issue whether the native customs of *pulau galau* and *pemakai menoa* are part of Sarawak Law. So, premised on that ground it can be said that there has not been any majority judgment by the panel of the four remaining judges.

[74] As for the reversal of the fact-finding process by Justice Abu Samah, it has been shown that he had, with respect, no jurisdiction to embark on his fact finding on two counts, namely the issue of evidential proof by the applicants was never an issue in the appeals and secondly, there has been departure from the parameters set out in s 96 of the CJA and not within the generally recognised exceptions aforementioned. Accordingly, I am of the view that what Justice Abu Samah decided on the issue of proof must, with respect, be ignored.

[75] I am fully conscious of the fact that Justice Abu Samah had expressly agreed with Justice Raus Sharif's decision in allowing the appeals only. As shown above, he had an opposing view on the central issue. Further and with respect, that does not detract from the fact that his agreement was premised on a finding offact which he was devoid of jurisdiction to make (as explained above) and, shown above, that he had agreed with the proposition put by Justice Zainun Ali on the central issue.

[76] I am also aware of the contention that mistakes of law or fact by a court do not make for a ground of review. With respect what we have here is more than a mistake of fact or law. What we have is unique in that we are dealing with an allegation of coram failure pursuant to s 78 of the CJA and when there is reasonable doubt as to whether there was in fact a majority decision, benefit should be given to the applicants here as the rights in dispute here are constitutional rights of the indigenous or the first peoples of the country who are protected by the Federal Constitution in the form of art 161A. For all intents, this ground of review is a procedural challenge premised on coram failure and certainy not a direct or much less a collateral attack on the merits of the decision.

[77] Further, the sanctity of any decision of the Federal Court must always be maintained and protected so that the public's confidence of its judgments remain high bearing in mind whatever pronouncement made by the apex court

becomes the law of the land. Hence it is incumbent on us that where there is doubt as to the accuracy of any judgment, as in this review, it must be corrected.

[78] Accordingly, I find that there has been an infringement of s 78 of the CJA, resulting in a coram failure.

Ground (ii) — Bornean judicial experience

The judgment of the Federal Court in *Keruntum Sdn Bhd v The Director of Forest & Ors* [2017] MLJU 2437; [2018] 4 CLJ 145

[79] This court has had the occasion to consider this point in *Keruntum Sdn Bhd v The Director of Forests & Ors* [2017] MLJU 2437; [2018] 4 CLJ 145. There the applicant's action at the High Court to recover damages against the respondents was dismissed and the appeal against the High Court's decision was also dismissed by the Court of Appeal. The appeal by the applicant to the Federal Court was also dismissed with Hasan Lah FCJ delivering the judgment. The applicant then took out an application to review premised on the ground that there was coram failure in the Federal Court hearing in that the applicant, being a company incorporated in Sarawak, is entitled to have a panel of judges hearing the appeal to have at least one judge of Bornean judicial experience. This argument was made pursuant to art 128 of the Federal Constitution read together with para 26(4) of the IGC report. It was further contended that the phrase 'with Bornean judicial experience' in para 26(4) of the IGC Report 1962 must mean having judicial experience at the time of the sitting and Hasan Lah FCJ, who sat and wrote the judgment of the Federal Court, was not of Bornean judicial experience.

[80] On the issue whether there is in Law a requirement of having the presence a judge of Bornean judicial experience, the Federal Court through the judgment of Zulkefli Ahmad Makinudin PCA held as follows (paras 19–21):

> It is to be noted that the recommendation in para 26(4) of the IGC report was never implemented under article VIII of the Malaysia Agreement 1963 ...
>
> The said recommendation in para 26(4) was never implemented by an express provision in the Federal Constitution nor by any legislative, executive or other action by the Government of the Federation of Malaya, North Borneo (Sabah) and Sarawak. We are in agreement with the submission of learned counsel for the respondent that article VIII of the Malaysia Agreement did not mandate the Judiciary to take action to implement the said recommendation and the recommendation in para 26(4) of the IGC report cannot be enforced by the courts whether by a decision made in this application or by way of rules made pursuant to ss 16 and 17 of the CJA.
>
> It is our judgment that since the said recommendation of the IGC report has not and was never implemented under Article VIII of the Malaysia Agreement, the

applicant cannot therefore claim any legal right to have a 'Judge with Bornean experience' in the appeal panel when its appeal was heard and decided by the Federal Court.

[81] As to what the phrase of 'Bornean judicial experience' means and whether the judge who delivered the principal judgment in that case to wit, Hasan Lah FCJ, possessed 'Bornean judicial experience', Zulkefli Ahmad Makinudin PCA said, at paras 22–24:

> It is noted that the expression 'Bornean judicial experience' was not defined nor explained in the IGC report. The applicant might have contended that this expression means 'a Judge of Borneo' or that 'a Judge of Borneo' is a person who is from the Borneo States by reason of having been born or resident there. On this point, we do not think that a Judge 'with Bornean judicial experience' in the context of the IGC report is a person 'of Borneo' by reason of his birth and residence in the Borneo States. This is because the term 'Borneo judicial experience' puts emphasis on 'Judicial experience' and not on the 'origin' of the judge.
>
> We are of the view the term 'Judicial experience' must in its plain and ordinary meaning mean that a judge who has the experience of having served as a Judge in any of the Borneo States and in his judicial capacity as a judge has heard and disposed of cases arising from a Borneo State before any court whether subordinate court, High Court, Court of Appeal or the Federal Court when that particular court sits in the State.
>
> It is worth noting that His Lordship Hasan Lah FCJ, who wrote the judgment of the Federal Court in the present case, had previously served in the High Court in Sarawak and had heard and decided on cases filed in the High Court in Sarawak. As for the remaining four members of the five members' panel of the Federal Court who sat in the present case, they too had previously sat in the Court of Appeal and Federal Court to hear and dispose of cases originating either from Sabah or Sarawak.

[82] With respect, I disagree with the views expressed in the *Keruntum* judgment. But, before I set out my reasons, I am fully aware of the argument that this may not be an appropriate time and forum to 'revisit' this issue as it had already been decided by the *Keruntum* judgment not too long ago. With respect, it should be noted that this issue of 'Bornean judicial experience' was canvassed and decided in a review application in another case. What we have here is a fresh review application asking us to relook and reconsider the *Keruntum* judgment under a different factual matrix in that the panel of judges in this case have not served as High Court judges in the High Court of Sabah and Sarawak as opposed to Hasan Lah FCJ who had served as a judicial commissioner in the Miri High Court. As this issue concerns a constitutional issue affecting the livelihood of the indigenous peoples or the first peoples of this country, I see no good reason not to relook at the decision in *Keruntum*. The importance of arts 153 and 161A of the Federal Constitution should not be ignored as the former article provides that the special position of the

applicants, as indigenous people of Sarawak, is to be safeguarded by the Yang di-Pertuan Agong. With that I will now move to my reasons for my view on this issue.

The legal basis for requiring a judge of 'Bornean Judicial Experience'

[83] As the whole premise of the *Keruntum* judgment is on s 74 of the CJA in not having an express direction to the Chief Justice to empanel a judge of 'Bornean judicial experience', a good starting point of my deliberation would be s 4 of the CJA and its impact on s 74 of the CJA.

[84] Section 4 provides as follows:

> In the event of inconsistency or conflict between this Act and any other written law other than the Constitution in force at the commencement of this Act, the provisions of this Act shall prevail.

[85] The above section, in my view, renders the CJA of superior and special status to all other legislation besides the Federal Constitution. This is made clear by the express provision that no other legislation supersedes the CJA. By this unique status, the CJA and the Federal Constitution ought to be read together. Article 128 of the Federal Constitution is the source which gives birth to the Federal Court but its functions, so to speak, are dealt with by the CJA. In the context of these review applications, s 74 of the CJA is the relevant provision which provides for the empanelling of the Federal Court by the Chief Justice.

[86] As the source of power of s 74 of the CJA is derived from a constitutional provision it can be said that the same is quasi-constitutional in nature. Further, s 74 is housed in Part IV of the CJA which deals generally with the functions of the Federal Court. Hence it is not unreasonable to say that s 74 of the CJA is an extension of the constitutional mechanism. Section 74 of the CJA, metaphorically speaking, puts the flesh on the bones.

[87] By reason of what I have stated in last two paragraphs, it is my view that s 74 of the CJA possesses a quasi-constitutional feature. My view is fortified by the pronouncement made by the Supreme Court of Canada in *Lavigne v Canada (Office of the Commissioner of Official Languages)* [2002] SCJ No 55 where at para 23, Gonthier J held:

> The importance of these objectives and of the constitutional values embodied in the Official Languages Act gives the latter a special status in the Canadian legal framework. Its quasi-constitutional status has been recognized by the Canadian courts. For instance, in *Canada (Attorney General) v Viola* [1991] 1 FC 373 at p 386 (see also *Rogers v Canada (Correctional Service),* [2001] 2 FC 586 (TD), at

pp 602–3), the Federal Court of Appeal said:

> The 1988 Official Languages Act is not an ordinary statute. It reflects both the Constitution of the country and the social and political compromise out of which it arose. To the extent that it is the exact reflection of the recognition of the official languages contained in subsections 16(1) and (3) of the Canadian Charter of Rights and Freedoms, it follows the rules of interpretation of that Charter as they have been defined by the Supreme Court of Canada. To the extent also that it is an extension of the rights and guarantees recognized in the Charter, and by virtue of its preamble, its purpose as defined in section 2 and its taking precedence over other statutes in accordance with subsection 82(1), it belongs to that privileged category of quasi-constitutional legislation which reflects 'certain basic goals of our society' and must be so interpreted 'as to advance the broad policy considerations underlying it.

[88] Not only does the CJA contain the provision rendering it superior to all other legislation (minus the Federal Constitution), it is like I mentioned, also an integral piece of legislation defining further the structures and procedures of our judicial institution within our constitution framework. In commenting on and analysing Canadian authorities on the subject, the learned author *Vanessa MacDonnell in 'A Theory of Quasi-Constitutional Legislation'. (2016) Osgoode Hall Law Journal 53.2, 508–539* expresses the view that such a feature ought to confer a legislation (in this case s 74 of the CJA) with quasi-constitutional status. To the learned author, legislative provisions implementing 'constitutional imperatives' such as establishing institutions and procedures of government possess a quasi-constitutional status. For clarity, this is what the learned author say at pp 518–520, 525–526 and 534–535:

> One of the themes that runs through the Canadian jurisprudence on quasi-constitutional statutes is that these laws are 'fundamental' in character. By invoking fundamental law, the sec prompts us to think about how quasi-constitutional statutes are linked to the legal rules, norms, and institutions that comprise the Constitution. But how do we identify legislation that is 'basic or fundamental enough to count as [quasi-]constitutional'? ...
>
> *In this article I argue that quasi-constitutional legislation is fundamental in the sense that it implements constitutional imperatives*. I use the term 'constitutional imperatives' to refer to constitutional obligations of varying degrees of specificity. *These obligations emanate from the rights-conferring aspects of the Constitution, as well as from those aspects of the Constitution that establish the institutions and procedures of government*. Following David Feldman, it is my view that quasi-constitutional legislation can include delegated legislation where such legislation implements constitutional imperatives. Following Feldman, Mark Elliot, and the Supreme Court Act Reference, *it may be more useful to think of individual provisions as having this status as opposed to a statute or regulation in its entirety.* As should be apparent, this definition of quasi-constitutional legislation is broad. It may render the concept too broad to be of great use as an interpretative principle. It does not, however, render it meaningless or 'trivial[].' *On the contrary, this definition sheds light on a significant*

amount of previously unrecognized quasi-constitutional law. What is the justification for adopting this definition of quasi-constitutional legislation? *The Court's characterization of quasi-constitutional legislation as fundamental suggests that some legislation is shaped by and embodies constitutional norms and imperatives.* This is different from the usual assertion that all legislation must be constitutionally compliant to be valid. It suggests, in short, that statutes play a role in implementing constitutional imperatives, either because governments must implement these imperatives or because it is merely a good idea or good policy ...

It would appear, then, that there are actually two categories of legislation with constitutional dimensions in Canada: legislation that is part of the Constitution, like the provisions of the Supreme Court Act at issue in the Reference, and quasi-constitutional legislation, like some provisions of the Canadian Human Rights Act. *The distinction between the two turns on whether the legislation forms part of the Constitution or simply implements a constitutional imperative.* It is conceivable that a change to a peripheral provision of the Supreme Court Act would not engage the amending formula but should still be characterized as implementing a constitutional imperative. Such a provision would be quasi-constitutional under the theory I propose. *Thus, individual provisions of laws that implement institutional and procedural elements of the Constitution might be characterized as either: (1) part of the Constitution, (2) quasi-constitutional, or (3) ordinary. As a general matter, it fs less difficult to make the case for recognizing institutional or procedural provisions as quasi-constitutional. Institutions that are referenced or implied in the Constitution must be designed and given the tools necessary for their functioning.* Now, the degree to which the Constitution prescribes the features of any given institution is another question entirely. *I am inclined to believe, as a preliminary view, that the Constitution has relatively little to say about the features of any individual institution of government, especially where the obligation to create that institution is merely implied, though the level of prescription found in the constitutional text is obviously an important consideration.*

The fact that the Canadian Constitution is anchored in a few key written documents has obscured the need to clarify or conceptualize the role of legislation in Canadian constitutional law, but such a need still exists. *The presence of a written constitution should not be understood as relieving courts and scholars of the task of articulating the place of legislation in the broader constitutional framework.* The UK jurisprudence and secondary literature demonstrates that it can be challenging to define the boundaries of constitutional legislation. Lord Justice Laws would define constitutional legislation to include instruments that '(a) condition[] the legal relationship between citizen and state in some general, overarching manner, or (b) enlarge[] or diminish[] the scope of what we would now regard as fundamental constitutional rights.' Feldman critiques Lord Justice Laws's definition on the grounds that it is 'both over- and under-inclusive.' *It is under-inclusive, he argues, because it fails to include legislation that creates institutions.* Moreover, by including legislation that secures rights, he argues, Lord Justice Laws's definition of constitutional legislation is over-inclusive. In Feldman's view, only this 'secondary' or 'framework' legislation should qualify as constitutional. Even if we can agree on general criteria for identifying quasi-constitutional or constitutional legislation, Khaitan raises a further set of concerns. 'The first problem,' he explains:

> is to determine with some certainty which institutions of the state are basic or fundamental enough to count as constitutional ... *Parliament has characterised the monarchy, Parliament and aspects of the judiciary as constitutional.* But are the army, civil service, the Court of Appeals, the Bank of England, city councils, Mayors etc. also constitutional institutions? How can we tell? (Emphasis added.)

[89] It is not unusual for certain statutory provisions to be accorded a quasi-constitutional status. The United Kingdom does not have a written Constitution expressly enumerating and guaranteeing fundamental liberties. To this effect, it was impliedly recognised in the Singapore Court of Appeal case in *Review Publishing Co Ltd and another v Lee Hsien Loong and another appeal* [2010] 1 SLR 52 that what is now the *Reynold*'s Privilege introduced by the House of Lords in *Reynolds v Times Newspapers Ltd and others* [2001] 2 AC 127 was a result of the right of free speech being accorded a quasi-constitutional status in the United Kingdom since its accession to the European Convention of Human Rights.

[90] In our jurisdiction we see similar sentiments in *Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors* [2005] 6 MLJ 289 at p 304; [2005] 4 CLJ 169 at p 185 where Gopal Sri Ram JCA (as he then was):

> Now, the extrinsic material to which I have referred makes it abundantly clear that the purpose of the 1954 Act was to protect and uplift the First Peoples of this country. It is therefore fundamentally a human rights statute. It acquires a quasi constitutional status giving it pre-eminence over ordinary legislation. It must therefore receive a broad and liberal interpretation.'

[91] Having established that s 74 of the CJA having a quasi-constitutional status, I now deal with the issue as to how s 74 of the CJA should be interpreted.

[92] This of course brings me to article VIII of the Malaysia Agreement 1963. It reads as follows:

> The Governments of the Federation of Malaya, North Borneo and Sarawak will take such legislative, executive or other action as may be required to implement the assurances Undertakings and recommendations contained in Chapter 3 of, and Annexes A and B to the Report of the Inter-Governmental Committee signed on 27 February, 1963, *in so far as they are not implemented by express provisions of the constitution of Malaysia.* (Emphasis added.)

[93] The material portion of the IGC Report is para 26(4) thereof which reads:

> (4) The domicile of the Supreme Court should be in Kuala Lumpur. Normally at least one of the Judges of the supreme Court should be a Judge with Bornean

judicial experience when the Court is hearing a case arising in a Borneo State; and it should normally sit in a Borneo State to hear appeals in cases arising in that State.

[94] To recapitulate, the *Keruntum* judgment, despite the presence of the just quoted provisions, found as a fact that subsequent to the IGC Report and the coming into force of the CJA throughout Malaysia, s 74 of the CJA remained unchanged in that words appearing in (IGC Report) para 26(4) do not appear in the same.

[95] Section 74 of the CJA reads as follows:

> (1) Subject as hereinafter provided, every proceeding in the Federal Court shall be heard and disposed of by three Judges or such greater uneven number of Judges as the Chief Justice may in any particular case determine.
>
> (2) In the absence of the Chief Justice, the most senior member of the Court shall preside.

[96] With respect, the *Keruntum* judgment took a simplistic approach and had ignored the importance and the significance of the Malaysia Agreement 1963 and the IGC Report in the context of the formation of this country. Assurances were given by the respective signatories to the Malaysia Agreement and such assurances were not ordinary assurances as without these assurances there would not have been a nation known as Malaysia. To state the obvious, those assurances were given with the intention that the same will be implemented and given the sanctity they deserve. To ignore those assurances could not have been an option for the signatories to the Malaysia Agreement 1963. These assurances cannot with respect be treated as if they were terms of a commercial agreement because they formed the basis of a birth of a nation and hence should be given different consideration. The difference in nature between assurances leading to a formation of a nation and terms of a commercial agreement is so stark and obvious that it requires no explanation.

[97] Hence, it is my view that the *Keruntum* judgment suffers in three aspects:

(a) firstly, the Federal Court ought to have applied the common law interpretation of international treaties;

(b) secondly, the Federal Court ought to have had due regard to past judicial decisions on the legal effect of Malaysia Agreement 1963; and

(c) thirdly, a fortiori the Federal Court ought to have accorded the Malaysia Agreement 1963 its proper construction to hold that the Judiciary is under the legal obligation to abide by para 26(4) of the IGC Report.

The common law presumption requiring the interpretation of domestic law to be in conformity with international law

[98] The signatories *(United Kingdom of Great Britain and Northern Ireland, Federation of Malaya, North Borneo, Sarawak and Singapore — a copy of the agreement can be accessed via this internet address — https://treaties.un.org — No 10760 — United Nations Treaty Collection)* to the Malaysia Agreement 1963 considered in its form and substance generally, renders the Malaysia Agreement 1963 an international treaty and therefore, a part of international law.

[99] It is trite that international law does not apply in a domestic context unless it is incorporated into domestic law (see *Bato Bagi & Ors v Kerajaan Negeri Sarawak and another appeal* [2011] 6 MLJ 297; [2011] 8 CLJ 766 and of the Court of Appeal in *AirAsia Bhd v Rafizah Shima bt Mohamed Aris* [2014] 5 MLJ 318). That said, it is also trite that where there is doubt or ambiguity as to the interpretation of domestic law, the courts would accord it an interpretation which conforms with the country's international law obligations provided that it does not conflict with any of its domestic law.

[100] What is the ambiguity here as far as s 74 of the CJA is concerned? Let me from the outset say this. I concede that a cursory look at s 74 of the CJA would not reveal any ambiguity. However, since s 74 of the CJA is a quasi-constitutional provision, one must look behind the words in the context of the Malaysia Agreement 1963 and related historical documents. Section 74(1) of the CJA confers on the Chief Justice with the sole discretion to empanel the members of the Federal Court. But it is bereft of any clear guideline as to how such discretion ought to be exercised and it is the absence of a clear guideline that it evokes ambiguity. I say this because in my view, s 74 of the CJA is capable of two different interpretations. One interpretation being that there is no duty on the Chief Justice to ensure that there is a judge of Bornean judicial experience in a panel convened by her for a case emanating from Sabah and Sarawak with the other interpretation being that there is such a duty as described in the previous sentence in view of the fact that para 26(4) of the IGC Report is incorporated into article VIII of the Malaysia Agreement 1963.

[101] To resolve such ambiguity, reference can be made to the country's international law obligations. This was the approach taken by the High Court of Australia in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353. At p 363, their Honours Mason CJ and Deane J opined as follows:

> *But the fact that the convention has not been incorporated into Australian law does not mean that its ratification holds no significance for Australian law.* Where a statute or subordinate legislation is ambiguous, the courts should favour that construction

which accords with Australia's obligations under a treaty or international convention to which Australia is a party (*Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1), at least in those cases in which the legislation is enacted after, or, in contemplation of, entry into, or ratification of, the relevant international instrument. That is because Parliament, prima facie, intends to give effect to Australia's obligation under international law. *It is accepted that a statute is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law* (*Polites v The Commonwealth* (1945) 70 CLR 60). Apart from influencing the construction of a statute or subordinate legislation, an international convention may play a part in the development by the courts of the common law. The provisions of an international convention to which Australia is a party, especially one which declares universal fundamental rights, may be used by the courts as a legitimate guide in developing the common law...

But the courts should act in this fashion with due circumspection when the Parliament itself has not seen fit to incorporate the provisions of a convention into our domestic law. Judicial development of the common law must not be seen as a back door means of importing an unincorporated convention into Australian law. A cautious approach to the development of the common law by reference to international conventions would be consistent with the approach which the courts have hitherto adopted to the development of the common law by reference to statutory policy and statutory materials (*Lamb v Cotogno* (1987) 164 CLR 1 *at pp 11–12). Much will depend upon the nature of relevant provision, the extent to which it has been accepted by the international community, the purpose which it is intended to serve and its relationship to the existing principles of our domestic law.* (Emphasis added.)

[102] A similar approach can be seen in the Canadian jurisdiction. This can be seen from Canadian Federal Court of Ottawa in *Canadian Security Intelligence Service Act (Re)* [2008] 4 FCR; 2008 230 FC 301 (*Re CISA*). The facts of that case were shortly these. The Canadian Security Intelligence Service ('CSIS') had applied for a warrant to investigate threats against the security of Canada at a location outside the borders of Canada. The question before the court was whether it was empowered by law to issue the CSIS with the warrant for extraterritorial investigations. The court ultimately dismissed the application on the grounds that doing so would put Canada in breach of its international law obligation to respect the sovereignty of other States. This was how Blanchard J put it at paras 50–52:

The intrusive activities that are contemplated in the warrant sought are activities that clearly impinge upon the above-stated principles of territorial sovereign equality and non-intervention. Further, the activities are likely to violate the laws of the jurisdiction where the investigative activities are to occur. This is not disputed by the Service. The amicus maintains that there is no evidence which would allow the Court to make such a determination. In my view, to require such evidence to be adduced would be to place a heavy burden on the Service. The Service intends to execute the warrant wherever the targets are located. Understandably, no specific

> foreign state is identified in the application since the Service is likely unable to predict where these targets may travel once they leave Canada. It is therefore difficult, if not impossible, to lead evidence as to the legality of the investigative activities sought to be authorized in a given jurisdiction at the application stage, since no foreign state is identified.
>
> Among the powers sought to be authorized under the warrant are: the ability to obtain access, install anything [portion deleted by order of the Court]; search for, examine, take extracts from, make copies of, or otherwise record information. Given the intrusive nature of the activities at issue, it is reasonable to infer that the activities are likely to violate the laws of the jurisdiction(s) where the warrant is to be executed. In any event, absent consent of the foreign state, the investigative activities at issue impinge upon the territorial sovereignty of the foreign state.
>
> By authorizing such activities, the warrant would therefore be authorizing activities that are inconsistent with and likely to breach the binding customary principles of territorial sovereign equality and non-intervention, by the comity of nations.

[103] The point in *Re CISA* was that the law was silent as to whether Canadian Courts could grant a warrant extraterritorially. Faced with such silence, the court refused to issue the warrant on the grounds that such issuance would put the Canadian State in breach of its customary international law obligation (an international law obligation akin to one imposed by treaties), or respecting the sovereignty of States. See also the judgment of the Canadian Supreme Court in *R v Hape* [2007] 2 SCR 292 *(Hape)* where at para 53 it similarly affirmed the principle requiring domestic law to be in conformity with international law be it customary international law or treaty law.

[104] The English Court of Appeal in *Salomon v Commissioners of Customs and Excise* [1966] 3 All ER 871 took a similar approach and this was how Diplock LJ (as he then was) put it at pp 875–876:

> *If the terms of the legislation are not clear but are reasonably capable of more than one meaning, the treaty itself becomes relevant, for there is a prima facie presumption that Parliament does not intend to act in breach of international law, including therein specific treaty obligations; and if one of the meanings which can reasonably be ascribed to the legislation is consonant with the treaty obligations and another or others are not, the meaning which is consonant is to be preferred.* Thus, in case of lack of clarity in the words used in the legislation, the terms of the treaty are relevant to enable the court to make its choice between the possible meanings of these words by applying this presumption ...
>
> I can see no reason in comity or common sense for imposing such a limitation upon the right and duty of the court to consult an international convention to resolve ambiguities and obscurities in a statutory enactment. If from extrinsic evidence it is plain that the enactment was intended to fulfil Her Majesty's Government's obligations under a particular convention, it matters not that there is no express reference to the convention in the statute. One must not presume that Parliament

A intends to break an international convention merely because it does not say expressly that it is intending to observe it. (Emphasis added.)

B **[105]** Applying the principles of law set out earlier, it is my view that it would be unacceptable to say that just because s 74 of the CJA does not expressly require for an empanelling of a judge of Bornean judicial experience, the Judiciary therefore is exempt from that requirement. Based on what I stated earlier, considering s 74 of the CJA is silent on the Bornean judicial experience point and that there is no other express statutory guidance on how the Chief Justice ought to exercise his or her discretion of empanelment, there is merit in the contention that s 74 of the CJA should be qualified by the IGC Report read in tandem with article VIII of the Malaysia Agreement 1963.

D **[106]** As for the contention that Parliament clearly did not intend for the 'Bornean judicial experience' requirement to apply in our law because the recommendations of the IGC Report were not incorporated the Malaysia Act 1963, I say with respect it is misconceived.

E **[107]** Suffice for me to refer to the Court of Appeal decision in *CAS v MPPL & Anor* [2019] 4 MLJ 243; [2019] 2 CLJ 454. In that case, it was argued that a suit to compel the defendants to undertake a paternity test would run the risk of illegitimising the child and doing so would be against the best interests of the child. The party opposing this argument cited article 7 of the United Nations Convention of the Rights of the Child (UNCRC) on the grounds that that provision conferred the child with the right to know who his or her biological parents are. It is to be noted that Parliament partially incorporated the UNCRC through the Child Act 2001 but left out article 7. Further, the Government of Malaysia made a reservation against article 7 ie so long as the same is not inconsistent with the Federal Constitution and national laws.

G **[108]** Applying the common law presumption on requiring conformity with international law, the Court of Appeal decided that article 7 applied in spirit. For completeness, I think the relevant portion of the judgment of the Court of Appeal at paras 34–36 bear reproduction:

H

> We are mindful that Malaysia made a reservation against article 7(1) of the UNCRC ... [T]his 'supposed' policy reasoning behind s 112 of the EA in not wanting to illegitimise children ought no longer to be the sole judicial philosophy in light of modern day global advancements in science and international human rights law. We do not see why the aforementioned principles are not applicable in Malaysia. As we have already held, s 112 of the EA does not bar enquiries into paternity yet, at the same time, conclusively presumes legitimacy. Enquiries per se into paternity do not in this sense illegitimise a child. Thus, this emphasis on the fear of illegitimising the

I

said child is not the determining factor when deciding to order a DNA test to determine paternity. Instead, the best interest of the child to know its biological parents is the larger concern.

[109] It must be noted that the Court of Appeal judgment in *CAS* was affirmed by this court in *MPPL v Anor v CAS* (02(f)-14-03/2018(W) — 29 January 2019).

[110] For reasons set out above, it is my considered view that the general requirement of having Judge of Bornean judicial experience vide para 26(4) of the IGC Report and article VIII of the Malaysia Agreement 1963 ought to be read into s 74 of the CJA.

The legal status of the Malaysia Agreement 1963

[111] With respect, the *Keruntum* judgment seems to pay scant attention to the principle of construction that when interpreting provisions of a constitution, regard ought to be accorded to the historical background. In the context of this review, the relevant historical document is, inter alia, the Malaysia Agreement 1963, being a document which precedes the Federal Constitution. As I stated earlier, as s 74 of the CJA in my view a quasi-constitutional provision, the principles of constitutional interpretation that I am about to elucidate below apply with equal force to that section as they do to the Federal Constitution.

[112] I can do no better in starting this part of my deliberation by referring to the decision of this court in *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545, where Zainun Ali FCJ said as follows:

> *A constitution must be interpreted in light of its historical and philosophical context, as well as its fundamental underlying principles.* As articulated by the Supreme Court of Canada in Reference *re Senate Reform* [2014] 1 SCR 704; (2014) SCC 32 (at paras [25]–[26]):
>
> > The constitution implements a structure of government and must be understood by reference to 'the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning ...' The rules of constitutional interpretation require that constitutional documents be interpreted in a broad and purposive manner and placed in their proper linguistic, philosophic, and historical contexts ... Generally, constitutional interpretation must be informed by the foundational principles of the Constitution, which include principles such as federalism, democracy, the prorection of minorities, as well as constitutionalism and the rule of law ...
> >
> > These rules and principles of interpretation have led this Court to conclude that the Constitution should be viewed as having an 'internal architecture' or 'basic

> constitutional structure' ... The notion of architecture expresses the principles that '[t]he individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole' ... In other words, the Constitution must be interpreted with a view to discerning the structure of government that it seeks to implement. The assumptions that underlie the text and the manner in our interpretation understanding and application of the text ... (Emphasis added.)

[113] This court also in *Public Prosecutor v Azmi bin Sharom* [2015] 6 MLJ 751 referred to the Reid Commission Report 1957 in construing the legislative history of art 10(2) of the Federal Constitution in determining the constitutionality of the Sedition Act 1948. This is of course but one instance where pre-constitutional documents have played a role in constitutional interpretation.

[114] The reference to pre-constitutional documents to construe the constitution is an approach popularly used by other jurisdictions. In the United States, they have something called the 'Federalist Papers'. One author by the name of Gregory Maggs explains what these papers are in 'A Concise Guide to the Federalist Papers as a Source of Original Meaning of the United States Constitution' (2007) 87 BUL Rev 801:

> In the fall of 1787 and spring of 1788, Alexander Hamilton, James Madison, and John Jay undertook efforts to help make this happen. Working together, they wrote a series of 85 essays explaining the Constitution and urging its ratification in the State of New York. Each of these essays bore the title 'The Federalist' followed by a number designating its order in the series. Historians typically refer to the 85 essays as the 'Federalist Papers'.

[115] In *Cohens v Virginia* (1821) 19 U.S. 264, Chief Justice John Marshall observed as follows on the integral value of the Federalist Papers on the US Constitution at p 418:

> It is a complete commentary on our constitution; and is appealed to by all parties in the questions to which that instrument has given birth. Its intrinsic merit entitles it to this high rank; and the part two of its authors performed in framing the constitution, put it very much in their power to explain the views with which it was framed.

[116] Indeed, the Federalist Papers have played a tremendous role in many decisions of the US Supreme Court. See generally: Pamela Corley et al, 'The Supreme Court and Opinion Content: The Use of the Federalist Papers' Political Research Quarterly, Vol 58, No 2 (Jun, 2005) 329.

[117] Also relevant is the approach of the Australian courts in respect to their pre-constitutional documents. In *Cole v Whitfield* (1988) 78 ALR 42, at pp 49

and 55, the High Court of Australia unanimously held as follows:

> *Reference to the history of s 92 may be made,* not for the purpose of substituting for the meaning of the words used the scope and effect — if such could be established — which the founding fathers subjectively intended the section to have, but for the purpose of identifying the contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged ...
>
> *Attention to the history which we have outlined may help to reduce the confusion that has surrounded the interpretation of s 92.* That history demonstrates that the principal goals of the movement towards the federation of the Australian colonies included the elimination of intercolonial border duties and discriminatory burdens and preferences in intercolonial trade and the achievement of intercolonial free trade. (Emphasis added.)

[118] The relevance and the reliance placed on historical documents was also very aptly put by Callinan J in his dissenting judgment in *New South Wales v Commonwealth of Australia* [2006] HCA 52 at paras 683–687:

> Judges now acknowledge that the history of the making of the Constitution, especially the most reliable account of it, the statements made in the Constitutional Convention Debates, is highly relevant to an understanding of it. In *Cole v Whitfield* the court said this:
>
> > *Reference to the history ... may be made, not for the purpose of substituting for the meaning of the words used the scope and effect — if such could be established — which the founding fathers subjectively intended the section to have, but for the purpose of identifying the contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged.*
>
> It seems to me that the distinction which the makers of that statement sought to make, between subjective intention, and the meaning of the language used, the subject of it, and the nature and objective of the movement towards federation in constitutional discourse, is in truth a distinction without a difference. In particular, 'the subject to which that language was directed' can only be the subject identified by the speakers about it, and unless they were being disingenuous, their stated subjective intentions and the subject of their language were one and the same.
>
> In his paper, 'The Constitutional Commission or The Inescapable Politics of Constitutional Change', Professor Davis did not doubt that a knowledge of a history of a Constitution was essential for its understanding and interpretation:
>
> > A constitution, it is often said, is what the Judges say it is. In its proper context, this is unquestionably true. But it is equally true that it is more than this. Like any institution, a constitution is first and foremost its history. It is the memories and the experience of all those who have ever lived by it, and of all those who continue to live by it. It is the written commentaries upon it, the judicial pronouncements, the learned discussions, the controversies, the public inquiries, the parliamentary debates and the referenda polemics.

In *XYZ v Commonwealth*, a case concerning the external affairs power, Heydon J and I said the following, which is unaffected by the fact that our decision was a dissenting one: 786

> These inqumes seem pointless unless, in general, the meaning of an expression in the Constitution like 'external affairs' comprises the meanings which skilled lawyers and other informed observers of the federation period would have attributed to it, and, where the expression was subject to 'dynamism' the meanings which those observers would reasonably have considered it might bear in future. What individual participants in the Convention debates said it was intended to mean, or meant, either during those debates or later, is no doubt immaterial, save to the extent that their linguistic usages are the primary sources from which a conclusion about the meaning of the words in question can be drawn. Further, no doubt the mere fact that a particular instance of the expression 'external affairs' was not foreseen, or could not have been foreseen, in 1900, does not conclusively indicate that the instance in question could not now fall within it. But, subject to considerations of those kinds, it might be asked whether it is not legitimate to seek to measure the ambit of the power by reference to the meaning which, in 1900, that expression bore or might reasonably have been envisaged as bearing in the future.
>
> The two quoted passages from the cases state the bare minimum of the utility of the Convention Debates ...

[119] The question in that case was whether the amendment to the Workplace Relations Act 1996 was constitutional. It was in this determination that Callinan J held that due regard may be had to historical documents to determine the proper interpretation of the various portions of s 51 of the Commonwealth Constitution — the constitutional section upon which the challenge was based.

[120] Callinan J's reference to the Convention Debates was not something unique to his Honour's dissent. In fact, the majority of the court comprising Gleeson CJ, Gummow, Hayne, Heydon, and Crennan JJ all appeared to affirm the view that reference may validly be had to historical documents in the construction of constitutional provisions. Their Honours held as follows at paras 66 and 197:

> The examination of those matters will reveal that a distinction of the kind relied on by the plaintiffs, between the external relationships of a constitutional corporation and its internal relationships, does not assist the resolution of the issues presented in these matters. It is a distinction rooted in choice of law rules which cannot, and should not, be transposed into the radically different area of determining the ambit of a constitutional head of legislative power. *It is a distinction which finds no support in the Convention Debates or drafting history of s 51(xx). It is a distinction of doubtful stability but, if it were to be adopted, there seems every reason to treat relationships with employees as a matter external to the corporation ...*
>
> It is convenient to summarise at this point the conclusions that follow from the

preceding discussion of the arguments about s 51(xx), before dealing with the arguments advanced by the parties concerning the relationship between s 51(xxxv) and (xx). The distinction between external and internal relationships of corporations proffered by the plaintiffs as a limit to the legislative power conferred by s 51(xx) should be rejected as an inappropriate and unhelpful distinction. As explained earlier, transposing a distinction originating in choice of law rules into the present context is inappropriate. *The distinction finds no reflection in the Convention Debates or the drafting history of s 51(xx) and, in any event, is unstable.* Adopting it would distract attention from the tasks of construing the constitutional text, identifying the legal and practical operation of the impugned law, and then assessing the sufficiency of the connection between the impugned law and the head of power. (Emphasis added.)

[121] In short, their honours of the Australian High Court were all on the same page in that historical documents do play an integral role in constitutional interpretation and ought to be referred to in constitutional interpretation.

[122] Further, they appeared to express the view that historical documents, in their case the Convention Debates, indicate the very basis and premise on which the Australian nation was built. It further cements the criticalness of those historical documents on the interpretation of the Constitution.

[123] In Malaysia, the Malaysia Agreement 1963 has also played an integral role in the interpretation of our Federal Constitution. Perhaps the seminal authority evincing its application is the historical judgment of Thomson CJ (sitting in the High Court) in *The Government of the State of Kelantan v The Government of the Federation of Malaya and Tunku Abdul Rahman Putra Al-haj* [1963] 1 MLJ 355.

[124] That case concerned the eleventh-hour application by the State of Kelantan to injunct the Government of Malaya from entering into the Malaysia Agreement 1963. One need only consider history to know how that case ended. Anyway, in arriving at his decision to dismiss Kelantan's application for an injunction, Thomson CJ made the following observations on how the Constitution of the Federation of Malaya ought to be interpreted. His Lordship at p 358 said:

Although the Constitution forms an important part of the municipal law of the country it is also part of an Agreement between the previously sovereign States that went to make up the Federation of Malaya and accordingly should be construed in the light of the principles generally applied to the interpretation of treaties. These are summarised in the following passage from Wheaton's International Law (6th Ed) p 522:

> The general principle is that treaties, being compacts between nations, are not to be subjected to the minute interpretation which in private law may result in

defeating through technical construction the real purpose of the negotiators. (Emphasis added.)

[125] The above supports my point on treaty interpretation. That being said, the above case dealt with the pre-formation situation of Malaysia. The *locus classicus* on the effect of the Malaysia Agreement 1963 post-formation of Malaysia was properly dealt with by this court in *Datuk Hj Mohammad Tufail bin Mahmud & Ors v Dato Ting Check Sii* [2009] 4 MLJ 165 ('Tufail').

[126] The case concerned the validity of a lawyer qualified in West Malaysia to appear as counsel before the Court of Appeal at Putrajaya in a matter which arose from the High Court in Sabah and Sarawak at Kuching. In gist, the Federal Court was called upon to determine whether the said lawyer, having not qualified under the law of Sarawak could indeed appear before the Court of Appeal. The Federal Court, after considering the relevant provisions of the Federal Constitution and the Malaysia Agreement 1963, decided that he was not qualified.

[127] At paras 15–18 and 23, Zaki Azmi CJ opined as follows:

> The Cobbold Commission was created to ascertain the views of the people of the Borneo States. The report showed that the people had fears of substitution of one colonisation with another; fear of being taken over by the then Federation of Malaya; fears of the submersion of the individualities of North Borneo and Sarawak within the then Federation of Malaya.
>
> The Cobbold Commission unanimously agreed that the formation of the Federation of Malaysia is in the best interest of North Borneo and Sarawak ...
>
> These fears were ultimately addressed by the formation of the Inter-Governmental Committee (IGC) on which the British, Malaya (now properly known as Semenanjung Malaysia), North Borneo and Sarawak Governments were represented. Its task was to work out the future constitutional arrangements, including safeguards for the special interests of North Borneo and Sarawak relying on the Cobbold Commission Report.
>
> Following the IGC Report, the Malaysia Agreement was concluded between the United Kingdom of Great Britain and Northern Ireland, the Federation of Malaya, North Borneo, Sarawak and Singapore and signed on 9 July 1963 (see p 3 of the Malaysia Agreement, see also *The Government of the State of Kelantan v The Government of the Federation of Malaya and Tunku Abdul Rahman Putra Al-Haj* [1963] MLJ 355).
>
> *It must be noted that without such recommendations in the JGC, Cobbold Commission and the Malaysia Agreement. there may not be a Malaysia (The Birth of Malaysia (3rd Ed, 2008), Malaysia Singapore and Hong Kong, Sweet & Maxwell Asia at p 11).* (Emphasis added.)

[128] It is true that in *Tufail*, the Federal Court was called upon to interpret art 161B of the Federal Constitution regarding the exclusive right of audience afforded to lawyers from the States of Sabah and Sarawak for cases that arise from those states. This is of course a safeguard expressly guaranteed in the provisions of art 161B of the Federal Constitution and the relevant provisions of the Malaysia Act 1963.

[129] Does it necessarily mean that since the recommendations in para 26(4) of the IGC Report have not expressly been enacted into written law, they are not legally binding on us? Based on my explanation on the common law presumption above, I think the answer is clear. It bears repeating that the discretion of the Chief Justice in s 74 of the CJA ought to be construed in a manner requiring the Judiciary to uphold the recommendations in para 26(4) of the IGC read together with article VIII of the Malaysia Agreement 1963. While I have held that this recommendation applies, I hope to complete the picture shortly as to why the recommendation binds not just the Executive and Legislative bodies but also the Judicial branch. Therefore, in my considered view, the recommendations forwarded in the IGC Report *qua* Malaysia Agreement 1963 ought to apply with equal force to s 74 of the CJA as they do with the Federal Constitution.

The judiciary's obligation under the Malaysia Agreement 1963

[130] In my view, a plain reading of article VIII of the Malaysia Agreement 1963 itself imposes an obligation on the Judiciary to observe the recommendations in para 26(4) of the IGC. For completeness, I reproduce the relevant portion of the said article VIII as follows:

> The Governments of the Federation of Malaya, North Borneo and Sarawak will take such legislative, executive *or other action* as may be required to implement the assurances, undertakings and recommendations. (Emphasis added.)

[131] Article VIII of the Malaysia Agreement 1963 is a treaty provision and so calls for the standard method of treaty interpretation contained in *Article 31 of the Vienna Convention of the Law of Treaties (VCLT) 1969*. Article 31(1) of the VCLT reads:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

[132] Even though the VCLT 1969 only came into force after the conclusion of the Malaysia Agreement 1963, it has been recognised that the aforementioned provisions of the VCLT 1969 are still reflective of the customary international law and are applicable in the interpretation of

international treaties concluded prior to the entry into force of the VCLT 1969. See for instance the judgment of the International Court of Justice in ICJ *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal) (Judgment)* [1991] ICJ Rep 53, at para 48 where the International Court said, that the principles of treaty interpretation therein contained:

> are reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which may in many respects be considered as a codification of existing customary international law on the point.

[133] Referring to the judicial pronouncements in *Tufail* and the string of cases aforementioned, it is clear that the object and purpose of the Malaysia Agreement 1963 was towards the formation of Malaysia. Central to this ideology was to preserve and protect certain rights fundamental to the people of the Borneo States. To recapitulate, without the Malaysia Agreement we would not have the Federation of Malaysia much less the Federal Constitution as it exists in its present form.

[134] One ought to also have due regard to the *ejusdem generis* rule, a trite canon of interpretation. When general language follows a series of more specific terms, the class of things referred to by the general language may be read down to refer to a narrower class of things to which the specific terms all belong. See *Judicial Commission of New South Wales, 'Statutory Interpretation — Principles and Pragmatism for a New Age' (Education Monograph, 2007)* at p 129.

[135] With that in mind, the common-sense approach would be to construe the term 'or other action' in para 26(4) of the IGC Report as necessarily including the Judicial branch of government. To buttress this view, also relevant to this discussion is article 31(3)(c) of the VCLT 1969 which stipulates that together with the context, there shall also be taken into account any relevant rules of international law applicable in the relations between the parties.

[136] It is such a well-entrenched principle of international law that the judicial branch of government constitutes an organ of the State. For the sake of drawing an analogy, *Article 4(1) of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) 2001* prepared by the International Law Commission reads:

> The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

[137] The ARSIWA are generally regarded as a codification of trite principles of international law. As for the above provision, it recognises the core notion that the judicial branch is an organ of the State and that its decisions are considered as being acts of the State.

[138] The International Law Commission deliberately adopted such a broad phrase in 'whether the organ exercises legislative, executive, judicial or any other functions' as explained in its commentaries to the ARISWA. See: International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (2001) UN Doc A/56/10, *at pp 40–41:*

> *[T]he reference to a State organ in article 4 is intended in the most general sense.* It is not limited to the organs of the central government, to officials at a high level or to persons with responsibility for the external relations of the State. It extends to organs of government of whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level. *No distinction is made for this purpose between legislative, executive or judicial organs.* Thus, in the Salvador Commercial Company case, the tribunal said that:
>
> > a State is responsible for the acts of its rulers, whether they belong to the legislative, executive, or judicial department of the Government, so far as the acts are done in their official capacity
>
> ... Thus, article 4 covers organs, whether they exercise 'legislative, executive, judicial or any other functions'. This language allows for the fact that the principle of the separation of powers is not followed in any uniform way, and that many organs exercise some combination of public powers of a legislative, executive or judicial character. *Moreover, the term is one of extension, not limitation, as is made clear by the words 'or any other functions'. (Emphasis added.)*

[139] The above passage supports my view that applying common sense and the *ejusdem generis* rule to the phrase 'or other action' in article VIII of the Malaysia Agreement 1963, the Judicial branch is not relieved of the governmental obligation to implement the safeguards contained in the IGC Report.

[140] Any other interpretation would do considerable violence to the language of article VIII of the Malaysia Agreement 1963 if the courts may simply ignore any obligation under the agreement or divert it to the executive or the legislative branches. In other words, I see no merit in the argument that just because there is no express obligation to empanel a judge of 'Bornean judicial experience' in s 74 of the CJA, no such obligation ever existed.

[141] Surely, the best institution to determine judicial policy to wit, how to best empanel its own panels is a question best determined by the Judiciary

itself. And, for reasons already stated, it is something which the court is bound to do by the language of article VIII of the Malaysia Agreement 1963 in its capacity as the third branch of the Government of Malaysia.

[142] Lest there be any misunderstanding on my view, let me say this. I, in no way, am saying or even suggesting that a judge without such Bornean judicial experience is not at all competent to determine cases from the Borneo States. My view is anchored on two reasons and they are these. One, as I alluded above, it is provided for in para 26(4) of the IGC Report. Not giving that paragraph its due effect and place in s 74 of the CJA would purely and simply be ignoring the terms and conditions agreed to by our founding fathers in the formation of Malaysia. Lest also we forget that the applicants, being the indigenous people of Sarawak, hold special position within the framework of our constitution (see arts 153 and 161A) of the Federal Constitution.

[143] The second reason is the whole concept of public confidence in the Judiciary. The public confidence concept is just as important as the concept of independence of the Judiciary and the concept of transparency in the dispensation of justice. The public is the consumer of the service of justice and if there is no confidence by the public in the Judiciary, the legitimacy of the existence of Judiciary as the guardian of the rule of law would be compromised.

[144] It is undeniable that the concept of public confidence is one of the main reasons why we have specialised panels to hear cases concerning specialised area of the law. In our home soil, we have Construction Courts, Intellectual Property Courts, Family Courts and Commercial Courts. The existence of a specialist judge espouses confidence in the litigants that the panel contains at least one judge expert in the area. A panel of adjudicators ought to constitute a good mix of specialist and non-specialist Judges. On this point, the *European Commission for the Efficiency of Justice (CEPEJ) in its 2008 Report on European Judicial Systems* noted at p 76:

> Specialisation in courts is a growing trend amongst European countries. The CEPEJ is aware of the importance that specialised courts can play in improving the efficiency of justice as well as adapting it to the society's evolutions but at the same time this process should not generate confusion, conflicts of jurisdiction or even have consequences on costs of justice for users.

[145] Across the causeway, Singapore amended their Supreme Court of Judicature Act (Cap 322) which is their equivalent of our CJA to set up the Singapore International Commercial Court with the view of allowing international judges to sit, specifically in commercial cases, as judges of Singapore. The rationale is a simple one and that is to create a court consisting of judges with local and international judicial experience which in turn would enhance the confidence of future litigants to having their disputes resolved by

this specially created commercial court (see *Andrew Goodwin, 'International Commercial Courts: The Singapore Experience [2017] Vol 18 Melbourne Journal of International Law 219').*

[146] One can also say that this has also been envisaged in our Federal Constitution in art 122(1A) which reads as follows:

> Notwithstanding anything in this Constitution contained, the Yang di-Pertuan Agong acting on the advice of the Chief Justice of the Federal Court may appoint *for such purposes* or for such period of time as he may specify any person who has held high judicial office in Malaysia to be an additional Judge of the Federal Court. (Emphasis added.)

[147] The phrase 'for such purposes' provides an avenue to the Chief Justice of the day to appoint an additional Judge to sit for a specific case bolstering the point of the possibility of appointing an expert judge for a specific case.

[148] The Venice Commission in its report — *'Report on the Independence of the Judicial System Part I: The Independence of Judges' (82nd Plenary Session, 12–13 March 2010)* at paras 26 and 80 expressed similar views':

> *Finally, merit being the primary criterion, diversity within the judiciary will enable the public to trust and accept the judiciary as a whole. While the judiciary is not representative, it should be open and access should be provided to all qualified persons in all sectors of society ...*
>
> There may be circumstances requiring a need to take into account the workload or the specialisation of Judges. Especially complex legal issues may require the participation of Judges who are expert in that area. Moreover, it may be prudent to place newly appointed Judges in a panel with more experienced members for a certain period of time. Furthermore, it may be prudent when a court has to give a principled ruling on a complex or landmark case, that senior Judges will sit on that case. The criteria for taking such decisions by the court president or presidium should, however, be defined in advance. (Emphasis added.)

[149] In interpreting any provision of the law which relates to constitutional rights as does s 74 of the CJA, one must not just look at the words and give them a meaning as the words say literally. One must look beyond those words to ascertain whether the intentions of the drafter of the provision of the law are reflected in the meaning ascribed to them. One must adopt a prismatic approach so as to give some light to the words used. The neon lights emitting therefrom leads to a path, in my view, where s 74 of the CJA must be interpreted in a manner consistent with the concept of public confidence of the judiciary.

[150] There is no better illustration of the public's and the stakeholders' concern for the need for a judge of 'Bornean judicial experience' to be empanelled in the appellate courts for matters emanating from the Sabah and Sarawak than these recent public statements. The Right Honourable Chief Minister of Sarawak Datuk Patinggi A bang Johari Tun Openg, no less, in a press statement on 14 June 2019 opined that there is such a need to have a judge of Bornean judicial experience empanelled for appeals emanating from Sabah and Sarawak. Similar sentiments were expressed by the Sabah Law Society and Advocates Association of Sarawak on or about the same time through a joint press statement. These statements are nothing more than a simple message that litigants in cases emanating from Sabah and Sarawak feel that they would be better served in terms of confidence if there is a presence of a judge with Bornean judicial experience in an appellate panel of judges.

[151] Laws especially relating to land and the *adat* of the indigenous people are unique to the states of Sabah and Sarawak and knowledge of such laws would, as in an intellectual property case, enhance the confidence of the judiciary. That, to my mind, was the thinking of the drafters of the Malaysia Agreement and IGC Report. As I have pointed out earlier, the conditions entrenched in the Malaysia Agreement are not your ordinary terms and conditions as they gave birth to a nation. To ignore these historical documents in construing s 74 of the CJA, being a quasi-constitutional provision, would, with respect, do significant injustice to the intention of the drafters.

[152] As pointed above, in Australia the courts referred to the Convention Debates papers as a tool of reference in interpreting their constitution. Similarly, the US Supreme Court use the Federalist Papers as a point of reference to determine the intention of the drafters of their constitution. Adopting that approach, I find no impediment to say that s 74 imposes a duty on the Chief Justice to ensure that in any appeals emanating from the states of Sabah and Sarawak, a judge of Bornean Judicial experience is a member of that panel. With that I now move to what the phrase 'Bornean judicial experience' entails.

[153] To be absolutely clear, it is certainly not my view that judges without Bornean judicial experience are incompetent or incapable of hearing 'normal' cases which arise from the Bornean States. I use the word 'normal' because para 26(4) of the IGC Report indicates that 'normally' at least one judge ought to sit in appeals emanating from the Bornean States. I elaborate this point further below. Reading the said para 26(4) in context, the critical phrase employed is that 'at least one judge *with Bornean Judicial experience*' ought to be empanelled in such cases. So, in cases of such kind, the Chief Justice is (under s 74 of the CJA) at liberty to empanel any number of judges subject to the safeguard that at least one of those judges possesses Bornean judicial

experience. Coram failure in breach of s 74 of the CJA therefore occurs when at least one judge of Bornean judicial experience is not empanelled in respect of those kinds of cases. And, that is exactly the complaint by the applicants herein ie that there was an utter lack of any judge with Bornean judicial experience when the 2016 judgment was delivered. This now leads to my interpretation of the phrase 'Bornean judicial experience', why none of the judges in respect of the 2016 judgment did not possess Bornean judicial experience, and that therefore, there was coram failure for breach of s 74 of the CJA.

Interpretation of the phrase 'Bomean Judicial Experience':

[154] To recapitulate, the *Keruntum* judgment found that the term 'Bornean judicial experience' must in its plain and ordinary meaning mean that a judge who has the experience of having served as a judge in any of the Borneo States and in his judicial capacity as a judge has heard and disposed of cases arising from a Borneo State before any court whether it be a subordinate court, the High Court, the Court of Appeal or the Federal Court when that particular court sits in either one of those two States. It was also noted that where a judge is born in the Borneo State is of no relevance in determining whether the same possesses such requisite experience.

[155] With respect, the aforesaid approach in construing para 26(4) of the IGC Report and article VIII of the Malaysia Agreement 1963 is flawed as the logic behind it is circular. A panel without a judge of Bornean judicial experience would not be properly constituted from the outset. However, the line of thinking in the *Keruntum* judgment seems to suggest that a judge, despite not having any Bornean judicial experience, but continues to sit in such panels may thereby retrospectively be said to have gained Bornean judicial experience. With respect, such an interpretation does not seem to sit well with the core preserve of para 26(4) of the ICG Report which as I recall, is to preserve the rights of the people of the Bornean States. Again, the expectation of Bornean litigants in cases that stem for Borneo States is that there be at least one judge with Bornean judicial experience.

[156] For brevity, I reproduce again the relevant paragraph with the hopes of deconstructing it to appreciate its context. The paragraph reads:

> (4) The domicile of the Supreme Court should be in Kuala Lumpur. *Normally at least one of the Judges of the Supreme Court should be a Judge with Bomean judicial experience when the Court is hearing a case arising in a Borneo State*; and it should normally sit in a Borneo State to hear appeals in cases arising in that State. (Emphasis added.)

[157] Firstly, I think we need to give some context to the word 'normally' appearing in the above paragraph. A reasonable construction would, in my

view, be to say that it is not in all cases a judge of Bornean judicial experience be included in the panel. For example, a simple dispute regrading a breach of contract or even tort would not be normal cases where the presence of a judge of Bornean judicial experience is necessary. Any panel of judges would be able to hear it even without the benefit of having Bornean judicial experience. However, what we have here in these review applications is a specialised area of law involving a constitutional right to livelihood of a section of society of this country which is protected by the Federal Constitution. Hence there cannot be any room for the argument this is not a 'normal case' which para 26(4) of the IGC Report had envisaged.

[158] The applicants argue that in this case, none of the judges in the 2016 judgment possessed Bornean judicial experience. Unlike in the case of the *Keruntum* judgment, Hasan Lah FCJ had once served as Judicial Commissioner of the High Court of Sabah and Sarawak. Owing to the facts of this case, I do not think it is appropriate for me to set out a definitive clear-cut standard of determining whether a given judge has Bornean judicial experience. What I can say, within the context of what I have set out above in determining the requisite threshold is the following:

(a) it cannot be the case that for a judge to have Bornean judicial experience he or she must be from Borneo. The emphasis in para 26(4) of the IGC Report is on the word 'experience'. So, putting things bluntly, just because a judge is born in Borneo, he or she cannot simply by that fact become cloaked with Bornean judicial experience. Being born in Borneo and living a life there as an ordinary person is an entirely distinct concept from having served and gained judicial experience in the High Court of Borneo. So, this threshold is too low; and

(b) it cannot also be the case that because a judge has served at any appellate level that he gains Bornean judicial experience. As I have explained, the logic here is circular.

[159] The circular logic point bears explanation. My view on this could potentially be rebutted on the following hypothetical scenario. It could be the case that an appellate panel may constitute a panel of judges where at least one judge has Bornean judicial experience. It could then be further argued that the rest of the judges may gain Bornean judicial experience by the fact that they, having sat in such a panel, gain Bornean judicial experience. I do not think that is the case.

[160] To me, such a scenario is insufficientto meet para 26(4) of the IGC Report's threshold. It is true that an appeal generally operates as a re-hearing. See generally: s 69 of the CJA and *Balasingham v Public Prosecutor* [1959] 1 MLJ 193. While a rehearing it may be, appellate courts are generally deprived

of the ability to make findings of fact as well as to observe the demeanour and credibility of witnesses and in that sense are less inclined to disturb findings of fact. A decision that best summarises this point is of the Federal Court in *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393 where at para 25 Gopal Sri Ram JCA said:

> Now, it settled law that it is no part of the function of an appellate court in a criminal case — *or indeed any case* — to make its own findings of fact. That is a function exclusively reserved by the law to the trial court. The reason is obvious. An appellate court is necessarily fettered because it lacks the audio-visual advantage enjoyed by the trial court. (Emphasis added.)

[161] So premised on the above reason, and based on further points I make below on how serving at the High Court of Sabah and Sarawak and in light of the advent of the mobile courts program, a judge without Bornean judicial experience sitting at the appellate level cannot logically be said to gain something he or she does not otherwise possess. They are deprived of the benefit of the audio-visual advantage which High Court judges and judicial commissioners possess. It is in this sense the logic is circular.

[162] I single out magistrates and session court judges from this equation for the reason that when it comes to 'judicial experience', the High Court generally has unlimited civil jurisdiction and enjoys the benefit of hearing cases of almost every kind — especially in the context of these review applications — relating to native customary rights. On the unlimited civil jurisdiction of the High Court, see generally ss 23 and 24 of the CJA.

[163] And, if we read art 121 of the Federal Constitution together with the decision of this court in *Indira Gandhi*, the judicial power of the federation is exercisable only by the superior courts which begins at the High Court level. Even though magistrates and session court judges do exercise judicial power, it is only to an inferior extent and thus the label 'inferior courts' (in art 121) or subordinate courts (as in the short title of the Subordinate Courts Act 1948).

[164] The other reason for my conclusion that above is this. Reading again para 26(4) of the IGC Report, I distil two points which stand out from the language employed therein. They are as follows:

(a) [A]t least one of the *Judges of the Supreme Court* should be a Judge with Bornean judicial experience; and

(b) when the court is hearing a case arising in a Borneo State, it should normally sit in a Borneo State *to hear appeals in cases arising in that State*.

[165] Apparent from the words balded above, emphasis is placed on having judges with such experience at the Supreme Court. In my considered view, use

of the phrase: 'normally at least one of the Judges of the Supreme Court should be a Judge with Bornean judicial experience when the Court is hearing a case arising in a Borneo State'. The language presupposes that at the appellate level, there already ought to be a judge with Bornean judicial experience. The rationale becomes even clear when one looks the Malaysia Act 1963 — an Act which introduced a host of amendments to the Federal Constitution establishing, among other things, the High Court in Sabah and Sarawak.

[166] Giving para 26(4) of the IGC Report and the salient provisions of the Malaysia Act 1963 a wholesome reading therefore suggests to me that most workable scenario therefore appears to be that a judge is truly said to have Bornean judicial experience when he or she has served in the High Court in Sabah and Sarawak. It to me, meets the appropriate safeguards.

[167] Given the aforementioned principles, all the judges who rendered the 2016 judgment, unlike the situation with Hasan Lah FCJ in the *Keruntum* judgment, had never served at the High Court of Sabah and Sarawak. Thus, it is my considered view, there was a complete lack of a judge of Bornean judicial experience in that panel thereby occasioning a breach of s 74 of the CJA read in tandem with para 26(4) of the IGC Report qua article VIII of the Malaysia Agreement 1963. There was therefore, a coram failure.

[168] Before I depart from this topic let me just say this. The wisdom of our founding fathers in crafting para 26(4) IGC Report as incorporated into article VIII of the Malaysia Agreement 1963 must not be casted to the side of irrelevance. The drafters were fully aware that there were differences between the then sovereign country of Malaya on the one side, and the Borneo States on the other, in terms of ethnicity of races and developments.

[169] Indigenous peoples in the Borneo States have different customs and cultures alien to the people of Malaya. The existence of Native Courts in both the Bornean States is a clear recognition of the special status of the indigenous people in that their customs and culture have the force of law. These courts are manned by their own people in the form of the 'ketua kampung' (village headman) and residents of that village. These courts are conferred with jurisdiction on personal law matters relating to marriage, divorce and inheritance.

[170] These differences must be acknowledged to ensure that their interests are protected. This protection comes in the form of para 26(4) IGC Report read together with article VIII of the Malaysia Agreement 1963, hence, to ignore it goes against one of the terms of the formation of the country of Malaysia.

[171] In the context of native customary rights, serving as a judge or judicial commissioner in the High Court of Sabah and Sarawak exposes him or her to the livelihood of the indigenous people through the mobile courts projects where the courts take justice to the indigenous peoples who live in the deep interior of the States where it would normally take some eight hours (if not more) by foot, car and boat to reach. By these visits, judges and legal officers witness first-hand the way the indigenous peoples live and the conditions in which they exist. We also learn their culture and customs. In the context of Sarawak, we learn how important the rainforest is to the semi-nomadic Penan. The rainforest is the foundation of their existence. For the Penan, the rainforest is their world, life, home, forever pulsating, and awake to their sustenance, medicinal and spiritual needs. In the context of Sabah, we learn that the Bajau Laut are the Sea Gypsies where the foundation of their very existence is the ocean. The ocean is their world and life. They earn their living solely based on the ocean's resources. Their place of abode is wooden houseboats built by themselves or stilt huts atop coral reefs.

[172] With such knowledge, the judge would be better equipped in terms of understanding the adjudication of matters relating to affairs of the indigenous peoples. Short of being judged by peers, disputes would be at least resolved by judges who have knowledge of their custom and culture. Thus, the emphasis on the word 'experience' in the phrase 'Bornean judicial experience'. Again, it bears repetition, that by no way means a judge with such experience is or will be particularly emphatic to litigants from the Bornean states. It simply means that cases which 'normally' require judges of such experiences may benefit by the existence of one expert judge on the subject.

[173] This approach in enriching the knowledge of judges and legal officers is not alien or unique by any means. In the jurisdiction of New South Wales, Australia, the Judicial Commission of NSW (equivalent to our Judicial Academy) in its aim to educate judges and legal officers of the courts on the affairs of the first peoples of Australia, has a program by the name of Ngara Yura which was initially established in 1992 in response to the final recommendations of the Royal Commission into Aboriginal Deaths in Custody that judicial officers should receive instruction and education on matters relating to Aboriginal customs, culture, traditions and society.

[174] In its website (http://www.judcom.nsw.gov.my), it states as follows:

> Judicial officers have an important responsibility to 'listen, learn and lead' when dealing with Indigenous Australians who come before them. The Ngara Yura Program aims to increase awareness among judicial officers about contemporary Aboriginal social and cultural issues, and their effect on Aboriginal people in the justice system. Aboriginal people appear before all state courts in NSW as parties and witnesses in both criminal and civil proceedings. *In order for justice to be done*

and be seen to be done, it is essential that judicial officers understand a wide range of issues relating to Aboriginal people, most particularly their history and customs (including behavioural norms and languages/dialects spoken and understood). The Ngara Yura Program also provides Aboriginal people with an opportunity to learn about the judicial process. The Ngara Yura Program is delivered through three main strategies:

- Judicial visits to Aboriginal communities in NSW
- conferences, workshops and seminars
- publications. (Emphasis added.)

[175] The aforesaid program bears great similarity or resemblance to the mobile court program which the Courts of Sabah and Sarawak embarked on since 2007. Like our counterpart in New South Wales, we place great emphasis on learning and understanding the culture and customs of the indigenous people of the Borneo States. Only with such understanding would, in my view, make the judge more capable of resolving disputes regarding rights of the indigenous peoples.

The failure of the applicants to object to the lack of the presence of a judge of coram failure

[176] Counsel for the respondents takes the position that there has been a complete waiver by the applicants to raise any objection to the makeup of the panel of judges at the hearing of the appeal proper. And if this contention is not sustained, then it would open floodgates for any unsuccessful litigant to challenge an unfavourable decision by way of review as is being done here.

[177] With respect, the aforesaid contention ignores the fact that the right of the applicants is a constitutional right and it is an established principle of law that there can be no waiver of a constitutionally recognised right. On this subject, two judgments of the Supreme Court of India have produced helpful pronouncements. The first is its decision in *Behram Khurshid Pesikaka vs The State of Bombay* [1955] 1 SCR 613 where at p 653 it was held:

> We think that the rights described as fundamental rights are a necessary consequence of the declaration in the preamble that the people of India have solemnly resolved to constitute India into a sovereign democratic republic and to secure to all its citizens justice, social, economic and political; liberty of thought, expression, belief, faith and worship; equality of status and of opportunity. These fundamental rights have not been put in the Constitution merely for individual benefit, though ultimately they come into operation in considering individual rights. *They have been put there as a matter of public policy and the doctrine of waiver can have no application to provisions of law which have been enacted as a matter of constitutional policy. Reference to some of the articles, inter alia, articles 15(1), 20, 21 makes the proposition quite plain. A citizen cannot get discrimination by telling the*

State 'You can discriminate' or get convicted by waiving the protection given under articles 20 and 21. (Emphasis added.)

[178] The Indian Supreme Court expressed the same sentiments in *Basheshar Nath v Commissioner of Income Tax, Delhi and Rajasthan* [1959] AIR (SC) 149 where at paras 13–14 it was held as follows:

> It seems to us absolutely clear, on the language of Art 14 that it is a command issued by the Constitution to the State as a matter of public policy with a view to implement its object of ensuring the equality of status and opportunity which every welfare State, such as India, is by her Constitution expected to do and no person can, by any act or conduct, relieve the State of the solemn obligation imposed on it by the Constitution. *Whatever breach of other fundamental right a person or a citizen may or may not waive, he cannot certainly give up or waive a breach of the fundamental right that is indirectly conferred on him by this constitutional mandate directed to the State.*

[179] These review applications concern the fundamental and constitutional rights of livelihood. Thus, it is clear that where there is a constitutional mandate imposed on the state, it cannot turn around and say that the subject waived his right. That to me would make a mockery of our Federal Constitution. I think it bears repeating here that one, the 'State' is represented by the Judiciary — one of its organs. Two, the relevant right is the expectation to have a judge of Bornean judicial experience in the hearing as manifested in s 74 of the CJA. I have already expressed my view that given its special nature and that the section is an extension of the constitutional powers given to the Judiciary via the Federal Constitution, the right is indeed a quasi-constitutional right.

[180] There is no practical distinction between a constitutional and quasi-constitutional right (see *Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors*). Accordingly, it is my view the applicants could not be said to have waived their rights to object.

Ground (iii) — The alleged infringement of the law in the majority judgment

[181] Having found that there was coram failure on the two other grounds argued before us, it is unnecessary for me to consider this point. Further, as I am of the view that these applications for review ought to be allowed and that these cases ought to be reheard, the correctness of the majority judgment can be properly ventilated in the rehearing of the merits.

A CONCLUSION

[182] The Federal Court is the apex court of the land and thus all its decisions carry with the badge of finality as there is no appeal avenue arising from such decisions. Such finality provides certainty in the law and permits society to conduct its affairs with the knowledge of what the boundary of the law is. With the concept of certainty comes the principle of 'stare decisis' where lower courts are required by law to follow the pronouncements of the Federal Court. Judges who ignore the principle of 'stare decisis' have been said to be engaged in conduct bordering on contempt as it damages the good working of the judicial system and does great disservice to themselves and the judicial system.

[183] Though there is no appeal avenue in respect of a judgment of the Federal Court, the Federal Court nonetheless has the inherent jurisdiction to review its own decisions as is codified in r 137 of the Rules of the Federal Court 1995. However, this review power can only be exercised in the rarest circumstances. The latest pronouncement on this power of review can be found in the Federal Court case of *Kerajaan Malaysia v Semantan Estates (1952) Sdn Bhd* [2019] 2 MLJ 609. These rarest circumstances include where there has been a coram failure and this has been manifested in the recent judgment of this court in *Bellajade Sdn Bhd v CME Group Bhd and another appeal* [2019] 5 MLJ 141; [2019] 8 CLJ 1.

[184] The rationale of r 137 in my view reminds this court that rendering justice is just as important as the concept of finality of its judgment. The message is clear and that is this so-called reserved review power of this court ought to be utilised when the appropriate circumstance arises. One such circumstance in my view is what we have here. One of the judge in the panel hearing the appeal had retired at the time of delivery of its decision and grounds. This retirement kicks in the operation of s 78 of the CJA which mandates for the remaining judges to continue with the proceeding but a majority decision must be delivered. I have shown earlier that there was in fact no majority and at best it was a superficial majority with no legal standing. Such a circumstance does not create any finality as there was no certainty. Further as I have highlighted throughout my grounds that we are dealing with constitutional rights of livelihood of the indigenous segment of our society and hence ensuring justice is dispensed comes to the forefront of our deliberation.

[185] Public concern over the 2016 judgment is manifested in the action of the Sarawak Government when they took extraordinary steps with great speed by passing legislation in its state assembly sitting in July 2018 to expressly recognise the native customs of *pulau galau* and *pemakai menoa*. This legislative action speaks volume for what it is. In support, I need only quote YB Douglas

Unggah when he introduced the Amendment Bill. See: *Hansard, 11 July 2018 at p 18:*

> *The amendments are necessary to give the customs and practices relating to territorial domain, the force of law.*
>
> *Under the Bill, we use the term native territorial domain instead of Pemakai Menua and Pulau Galau for inclusiveness* — because the practice relating to native territorial domain is not only practised by the Ibans, but also all other native communities in Sarawak. In the case of Rambli Kawi, Supertindent of Land and Survey, the courts have also recognised the concept of 'cari makan' of the Malay's equivalent to Pemakai Menua and Pulau Galau. Thus this amendment is inclusive and relevant to all the native.
>
> Tuan Speaker, it must be noted, although the dissenting Judgement of Yang Arif Zainun Ali, in Tuai Rumah Sandah's case gives legal recognition to Pemakai Menua and Pulau Galau, but such right is only limited to usufructuary rights, this means that the natives have the right to only use the resources within the Pulau Galau and Pemakai Menoa for their livelihood but they do not have any legal ownership any propriety rights of the land within those area.
>
> *Tuan Speaker, this Land Code (Amendment Bill), 2018, will not only recognise but also give legal effect to the territorial domain.* Clause 2 of the Bill through the definition of 'native communal title' expressly provided that a title in perpetuity will be issued in accordance with section 6A over a native territorial domain and that such native communal title shall be held to be a title under the Land Code. *This means, that the right under native territorial domain is a statutory proprietary right and not just limited to usufructuary right as recognised under common law and the decision on Tuai Rumah Sandah's case.* (Emphasis added.)

[186] For reasons stated above, I am of the considered view that an appropriate case has been made out under r 137 of the Rules of the Federal Court 1995. In the circumstances, I allow these review applications, set aside the 2016 judgment and order the appeals be reheard before another panel of judges, at least one of which must be a judge cloaked with Bornean judicial experience. In view of the circumstance of this review, I make no order as to costs.

[187] If I may conclude by quoting the Supreme Court of India in the case of *Rupa Ashok Hurra v Ashok Hurra & Anor* SCC (2002) 4 SCC 388 where Quadri J said as follows:

> Almighty alone is the dispenser of absolute justice — a concept which is not disputed but by a few. We are of the view that though Judges of the highest court do their best, subject of course to the limitation of human fallibility, yes situations may arise, in the rarest of the rare cases, which would require reconsideration of a final Judgment to set right miscarriage of justice complained of. In such case it would not only be proper but also obligatory both legally and morally to rectify the error.
>
> After giving our anxious consideration to the question, we are persuaded to hold

A that the duty to do justice in these rarest of rare cases shall have to prevail over the policy of certainty of judgment as though it is essentially in the public interest that a final Judgement of the final court in the country should not be open to challenge, yet there may be circumstances, as mentioned above, wherein declining to reconsider the judgment would be oppressive to judicial conscience and would cause perpetuation of irremediable justice.

B

Applications dismissed.

Reported by Ashok Kumar

C

D

E

F

G

H

I